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No. 455

THE AMERICAN SHIP BUILDING COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 6, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

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Form NLRB-501

(9-53)

Form Approved

Budget Bureau No. 64-R001.6.

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

Case No.	Date Filed
13-CA-4504	October 24, 1961

1. Employer Against Whom Charge is Brought

Name of Employer
American Ship Building Co.

Address
101st & Calumet River, Chicago, Illinois

Type of Establishment
Ship Building Company

Number of Workers Employed
50

Identify principal product or service
Ship Building

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

1. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, including Local 374 thereof, had a collective bargaining agreement with the said Employer which expired on August 1, 1961.

2. During the course of negotiations and for the purpose of coercing the union to accept the last company proposal, on August 11, 1961, the Employer laid off and illegally locked out its employees whose names appear on the attached sheet, in violation of Sections 8 (a) (1), (3) and (5) of the Act.

3. In the above and in other ways, the Employer has discriminated against its employees in regards to tenure of employment; it has interfered, restrained and coerced them in the rights guaranteed them under the Act and it has failed to bargain in good faith.

3. Full Name of Party Filing Charge

Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

4. Address

6333 Kennedy Avenue, Hammond, Indiana. Telephone No. TIlden 5-1000.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

6. Address of National or International, if any

New Brotherhood Building, 8th & State Avenue, Kansas City 1, Kansas. Telephone No. DRexel 1-2640.

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ David O. Peterson

(Signature of representative or person filing charge)

David O. Peterson

Business Manager
(Title, if any)

10/24/61
(Date)

AMERICAN SHIP BUILDING CO.

EMPLOYEES LOCKED OUT ON AUGUST 11, 1961

Pipefitters:
Mr. James Couillard
Mr. Chester I. Bulak

Carpenters:
Mr. Leon Deneve
Mr. George Homan

Electricians:
Mr. Michael Horvatich
Mr. Joseph Barrick
Mr. George Blazic
Mr. Herbert Calhoun

Crane Operators:
Mr. Millard Cox
Mr. Lloyd Ferguson
Mr. Robert Scott

Boilermakers:
Mr. Edward Lipka
Mr. Thomas P. Franciscovich
Mr. Anton Nick J. Chorak
Mr. John James Salakar
Mr. L. F. Williams
Mr. Antonio Rigoni
Mr. Emil Jansky, Jr.
Mr. Frank Dudek
Mr. Thomas Delaney
Mr. Edward J. Wolff

Boilermakers: (cont'd)
Mr. David J. Thompson
Mr. William Steinken
Mr. Henry W. Signs
Mr. Anthony J. Serapin
Mr. Norman T. Rosenquist
Mr. John Piltaver
Mr. Antonio Picciola
Mr. John E. Oman
Mr. John McGrory
Mr. Peter Mungas
Mr. Phillip Miller
Mr. Cal. F. Mierendorf
Mr. Edward D. Mantz
Mr. Frank S. Machowski
Mr. Henry G. Kutzer
Mr. Frank Krisco
Mr. William Klassen
Mr. Richard Jansky
Mr. George Jansky
Mr. Russell Ferry
Mr. Henry Dombrowski
Mr. Victor Dalla Costa
Mr. Paul Cruse
Mr. Martin Boich
Mr. Alex Barclay

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Thirteenth Region.

The American Ship Building Company and Local 374, International Brotherhood of Iron Ship Builders, Blacksmiths, Forgers and Helpers	Case No. 13-CA-4504

COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, that The American Ship Building Company, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151 *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Acting Regional Director for the Thirteenth Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Compyaint and Notice of Hearing and alleges as follows:

I.

The original charge was filed by the Union on October 24, 1961 and served on Respondent on or about October 26, 1961.

II.

(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Ohio.

(b) At all times material herein, Respondent has been engaged in the manufacture, repair and conversion of steamships and operates ship yards in Buffalo, New York; Lorain and Toledo, Ohio; and, South Chicago, Illinois.

(c) During the past year, Respondent, in the course and conduct of its business operations, performed services valued in excess of $100,000 at each of its shipyards in the states of New York, Illinois, and Ohio for various ship owners and steamship companies operating on the Great Lakes.

(d) During the past year, Respondent, in the course and conduct of its business operations, purchased, transferred and received at its Lorain, Ohio, shipyard, steel, ship parts, and other materials valued in excess of $100,000, which materials were transported to said shipyard directly from states of the United States other than the State of Ohio.

(e) During the past year, Respondent, in the course and conduct of its business operations, purchased, transferred and received at its South Chicago, Illinois, shipyard, steel, ship parts, and other materials valued in excess of $100,000, which materials were transported to said shipyard directly from states of the United States other than the State of Illinois and/or in foreign commerce directly from foreign countries.

III.

Respondent is now, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IV.

Each of the following named organizations is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers,

United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U. S. & Canada,

United Brotherhood of Carpenters and Joiners of America,

International Brotherhood of Electrical Workers,

Brotherhood of Painters, Decorators & Paperhangers of America,

International Brotherhood of Firemen and Oilers,

International Union of Operating Engineers,

Patternmakers League of North America;

all of which unions are affiliated with the AFL-CIO, and are hereinafter referred to as Group of Eight Unions.

International Association of Machinists, AFL-CIO, hereinafter referred to as Machinists Union.

V.

At all times material herein, Alex Dalrymple was manager of Respondent's South Chicago yard, and has been, and is now an agent of the Respondent acting on its behalf, and is a supervisor within the meaning of Section 2(11) of the Act.

VI.

(a) Since on or about August 1, 1958, and at all times material herein, the Group of Eight Unions and Respondent have been parties to a collective bargaining agreement covering the employees in the unit described hereinafter in paragraph IX (a), (b), (c).

(b) Since on or about August 1, 1958, and at all times material herein, the Machinists Union and Respondent have been parties to a collective bargaining agreement covering the employees in the unit described hereinafter in paragraph IX (d).

(c) Commencing on or about June 6, 1961, and continuing until October 27, 1961, the Group of Eight Unions, the Machinists Union, and the Respondent, at various times and places, engaged in collective bargaining and contract negotiations with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment pertaining to employees in the units described in paragraph IX herein.

VII.

(a) On or about August 11, 1961, and continuing until October 27, 1961, Respondent locked out its South Chicago yard employees listed in Schedule A, annexed hereto and made a part hereof.

(b) On or about August 11, 1961, Respondent notified the Illinois Department of Labor, Division of Unemployment Compensation, that even those employees who were not locked out but were laid off for other reasons, were laid off as the result of a labor dispute, thus depriving even those employees not involved in the actual lockout of unemployment compensation.

VIII.

Respondent engaged in the conduct set forth in paragraph VII (a) and (b) above in order to apply economic pressure on the Group of Eight Unions and on the Machinists Union to abandon bargaining demands made by them and to accept instead contract terms proposed by Respondent in the collective bargaining negotiations referred to in paragraph VI above and/or because Respondent's employees represented by said Unions sought to bargain collectively through representatives of their own choosing, and/or engaged in other concerted activities for the purposes of collective bargaining or mutual aid or protection.

IX.

The following units constitute appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(a) all production and maintenance employees of the Employer at its Buffalo, New York, Cleveland and Lorain, Ohio, and South Chicago, Illinois, shipyards, excluding guards and supervisors as defined in the Act.

(b) all production and maintenance employees of the Employer at its Toledo, Ohio, shipyard, excluding guards and supervisors as defined in the Act.

(c) all patternmakers of the Employer at its Buffalo, New York, Cleveland and Lorain, Ohio, and South Chicago, Illinois, shipyards, excluding guards and supervisors as defined in the Act.

(d) all machine shop employees of the Employer at its Buffalo, New York, Lorain and Toledo, Ohio and South Chicago, Illinois, shipyards, excluding all other employees, guards and supervisors as defined in the Act.

X.

(a) At all times since August 1, 1958, and continuing to date, the Group of Eight Unions, with the exception of the Patternmakers League of North America, AFL-CIO, have been the joint representatives for the purposes of collective bargaining of the employees in the units described above in paragraph IX (a), and, by virtue of Section 9(a) of the Act, have been, and are now, the exclusive representatives of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) At all times since August 1, 1958, and continuing to date, the Group of Eight Unions have been the joint representatives for the purposes of collective bargaining of the employees in the unit described above in paragraph IX (b), and, by virtue of Section 9(a) of the Act, have been, and are now, the exclusive representatives of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(c) At all times since August 1, 1958, and continuing to date, the Patternmakers League of North America, AFL-CIO, has been the representative for the purposes of collective bargaining of the employees in the unit described above

in paragraph IX (c), and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(d) At all times since August 1, 1958, and continuing to date, the Machinists Union has been the representative for the purposes of collective bargaining of the employees in the unit described above in paragraph IX (d), and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

XI.

By the acts described in paragraphs VII and VIII, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

XII.

By the acts described above in paragraphs VII and VIII, and by each of said acts, Respondent did discriminate, and is discriminating in regard to the hire, tenure, terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and Respondent thereby did engage in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) of the Act.

XIII.

By the acts described in paragraphs VII and VIII, and by each of said acts, Respondent did refuse to bargain collectively, and is refusing to bargain collectively, with the representative of its employees, and did thereby engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) of the Act.

XIV.

The acts of Respondent described in paragraphs VII and VIII above, occurring in connection with the operations of Respondent described in paragraph II above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3) and (5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 14th day of February, 1962, at 10:00 A. M., C. S. T., 22nd Floor, Hearing Room "B", Midland Building, 176 West Adams Street, Chicago, Illinois, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person or otherwise and give testimony.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, the Respondents shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the

service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED at Chicago, Illinois this 22nd day of December, 1961.

/s/ William J. Cavers,

William J. Cavers, *Acting Regional Director*
Thirteenth Region
National Labor Relations Board
176 West Adams Street
Chicago 3, Illinois

SCHEDULE A.

James Couillard
Chester I. Bulak
Leon Deneve
George Homan
Michael Horvatich
Joseph Barrick
George Blazic
Herbert Calhoun
Millard Cox
Lloyd Ferguson
Robert Scott
Edward Lipka
Thomas P. Franciscovich
Anton Nick J. Chorak
John James Salakar
L. F. Williams
Antonio Rigoni
Emil Jansky, Jr.
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Phillip Miller
Cal. F. Mierendorf
Edward D. Mantz
Frank S. Machowski
Henry G. Kutzer
Frank Krisco
William Klassen
Richard Jansky
George Jansky
Russell Ferry
Henry Dombrowski
Victor Dalla Costa
Paul Cruse
Martin Boich
Alex Barclay

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Thirteenth Region.

In the Matter of The American Ship Building Company and Local 374, International Brotherhood of Iron Ship Builders, Blacksmiths, Forgers and Helpers.	Case No. 13-CA-4504

ANSWER.

(Filed January 3, 1962)

Now comes The American Ship Building Company, by and through its attorney Charles Cavano, and for answer to the Complaint heretofore filed in this cause says:

1. Respondent admits the allegations of Section 1 of said Complaint.

2. Respondent admits the allegations of Section II of said Complaint, except as to Section II (a) Respondent states it is a corporation organized under, and existing by virtue of the laws of the State of New Jersey.

3. Respondent admits the allegations of Section III of said Complaint.

4. Respondent admits the allegations of Section IV of the Complaint.

5. Respondent admits the allegations of Section V of the Complaint.

6. Respondent admits the allegations of Section VI of the Complaint.

7. Respondent denies the allegations of Section VII, as well as Schedule A, annexed thereto, of the Complaint.

8. Respondent denies the allegations of Section VIII of the Complaint.

9. Respondent admits the allegations of Section IX of the Complaint.

10. Respondent admits the allegations of Section X of the Complaint.

11. Respondent denies the allegations of Section XI of the Complaint.

12. Respondent denies the allegations of Section XII of the Complaint.

13. Respondent denies the allegations of Section XIII of the Complaint.

14. Respondent denies the allegations of Section XIV of the Complaint.

Dated at Cleveland, Ohio, this 2 day of January, 1962.

/s/ Charles Cavano,

Charles Cavano, *Attorney for Respondent,*
The American Ship Building Company,
605 National City Bank Building,
Cleveland 14, Ohio.
Area Code 216—TOwer 1-8353.

I hereby certify that I have this day served a copy of the foregoing Answer upon Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, 6333 Kennedy Avenue, Hammond Indiana, and upon Bernard M. Mamet, Esquire, 327 South La Salle Street, Chicago 3, Illinois, by placing a copy of the same in the United States mail, postage prepaid to each of them.

/s/ Charles Cavano,

Charles Cavano, ***Attorney for Respondent.***

TRANSCRIPT OF THE TESTIMONY.

PROCEEDINGS.

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Trial Examiner Bott: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of American Ship Building Company and Local 374, International Brotherhood of Boiler Makers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Case No. 13 CA 4504. The Trial Examiner conducting this hearing is George J. Bott.

Will counsel and other representatives for the parties please state their appearances for the record. For the General Counsel.

Mr. Kossoff: Sinclair Kossoff, 176 West Adams Street, Chicago, Illinois.

Trial Examiner: For the Respondent.

Mr. Cavano: Charles Cavano, 605 National City Bank Building, Cleveland 4, Ohio.

Mr. Mamet: Bernard M. Mamet, 327 South La Salle, Chicago 4.

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Mr. Kossoff: General Counsel proposes to stipulate that all employees named on Schedule A in the complaint issued herein were issued copies of a lay-off notice that stated as follows: "Because of the labor dispute which has been unresolved since August 1, 1961, you are laid off until fur-

ther notice," signed by Manager A. Dalrymple, manager of the Chicago yard of Respondent.

Trial Examiner: Is that proposed stipulation satisfactory?

Mr. Mamet: Yes, sir.

Mr. Cavano: That is satisfactory to the Respondent.

Trial Examiner: The stipulation is noted and approved.

* * * * *

* * * * *

ALEXANDER DALRYMPLE, a witness called by and on on behalf of counsel for the General Counsel, National Labor Relations Board, and having been first duly sworn, was examined, and testified as follows:

Trial Examiner: Mr. Dalrymple, let's have your full name.

The Witness: Alexander Dalrymple.

Direct Examination.

Q. (By Mr. Kossoff.) Would you state your address, Mr. Dalrymple? A. 15130 Hastings Drive, Dolton, Illinois.

Q. Who are you employed by? A. The American Ship Building Company.

Q. And what is your position with them? A. Manager, Chicago yard.

Q. Do you have a superior in charge of you at the Chicago yard? A. Not at the Chicago yard.

Mr. Kossoff: At this time, Mr. Examiner, I request permission to examine Mr. Dalrymple under Section 43 B of the Federal Rules of Civil Procedure.

Trial Examiner: Permission is granted.

ALEXANDER DALRYMPLE, a witness previously called by and on behalf of counsel for the General Counsel, National Labor Relations Board, resumed the stand, was examined under Rule 43-B, and testified further as follows:

Direct Examination (Cont'd)

Q. (By Mr. Kossoff.) Mr. Dalrymple, I show you General Counsel's Exhibit No. 2. A. Yes.

Q. Were all employees who were working at the South Chicago yard on August 11, 1961 issued a copy of General Counsel's Exhibit 2 except for the name on August 11, 1961?

A. Yes, the people who were working.

Q. Were there people on the payroll who were not working? A. Yes.

Q. Were they also issued similar notices as appears on General Counsel's Exhibit No. Two? A. People on vacation, some of them now are in town, so

the people that are on vacation were left the slips in the gatehouse. So, the boys that were in town come down and picked up the slips. I let them lay there for two days. Anyone who failed to pick up his slip was sent a telegram after notifying him he was laid off.

Q. I show you General Counsel's Exhibit No. 3 for identification and ask you to look at the first half of that exhibit, the top of the page.

(Document tendered to witness)

A. Right.

Q. Is that a copy of a Western Union telegram? A. To my knowledge, yes.

Q. And is that addressed to Thomas Delaney? A. Yes.

Q. Who is Thomas Delaney? A. An employee of American Ship Building Company, Chicago.

Q. Was he working at the yard on August 11th? A. Evidently not.

Q. And was that telegram sent on August 11th or at a subsequent date? A. It's possible that one was sent on August 11th, were probably knew—I recollect we knew Mr. Delaney was absent, either on vacation or sick. I don't recollect which.

Q. Isn't it true all employees who were on vacation on August 11, 1961 who were on the payroll were issued copies

or sent identical telegrams that were sent to Mr. Delaney? A. Well, as I said, some of them came down to the gate and picked a copy up.

Q. Those that didn't pick it up on August 11th were not sent telegrams on August 11th? A. I wouldn't say the exact date. I'm not sure. I know a number was sent out on August 11th of people that we knew were on vacation; but as I say, we also knew that a number of people were still in town.

Q. Was there anyone else besides those who were working and who were on vacation who were issued any kind of a layoff notice such as appears on General Counsel's Exhibit No. 2? A. Not to my knowledge, no.

Q. So, if a person received a copy of said notice, he either was working on that date or he was on the payroll on vacation? A. Or off sick or off due to an accident.

Q. Is that correct? A. Yes.

Mr. Kossoff: Nothing further for me.

Mr. Cavano: I assume that this witness probably, Mr. Kossoff, will be recalled for other matters. You are just limiting it to this preliminary now?

Mr. Kossoff: That is correct.

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Q. (By Mr. Mamet.) Thomas Delaney, whose name appears on General Counsel's Exhibit No. 3, is to your knowledge, or was to your knowledge, at this time a member of the Union Negotiating Committee? A. Oh, yes.

Q. And as a matter of fact, this Thomas Delaney was returning on the 11th from the negotiations in Cleveland, was he not? A. He may have been. I was on the same negotiations as Tom. I was back in town, so probably he come by a different route back and was longer.

Q. When did you return from the negotiations in Cleveland? On the 11th? A. No, I think I was back the night before.

Q. You came back the night of the 10th? A. Yes, I recollect Tom was driving.

Q At about what time, Mr. Dalrymple, were these notices which you saw, General Counsel's Exhibit 2, distributed to the people on Friday, August 11th? A. Oh, in the afternoon.

Q. Was it not about three o'clock in the afternoon? A. It would be around that time, yes.

Q. And isn't it true around one o'clock in the afternoon you told your foreman that you were waiting for word from Cleveland as to what you were going to do?

A. I don't recollect that.

Q. Well, as of one o'clock in the afternoon, you didn't know yet what you were going to do, did you, relative to the distribution? A. I firmly—. I believe it was after lunchtime that I was notified what the procedure would be.

Q. By Cleveland, is that right? A. Yes, by Cleveland.

Q. You were notified to lay off the Chicago yard? A. Yes.

Mr. Mamet: I have no further question at this time.

Mr. Kossoff: I want to, at this time, with the Trial Examiner's permission, request that General Counsel's Exhibit No. 3 for identification; namely, a copy of a telegram sent to Mr. Thomas Delaney be admitted into evidence as General Counsel's Exhibit No. Three.

Trial Examiner: Any objection?

Mr. Cavano: We will object to it.

Trial Examiner: Objection overruled. It may be admitted.

(The document heretofore marked as General Counsel's Exhibit No. 3 was received in evidence.)

* * * * *

ALEXANDER DALRYMPLE:

Redirect Examination.

* * * * *

Q. Now, one other question. This will all come out later, but the entire South Chicago yard was shut down with the exception of your supervision, your foreman, is that right? A. Yes.

Q. They continued to work, your foremen? A. If you want to call it work, yes.

Q. They were paid, is that right? A. Yes, they're on salary.

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CHARLES E. ALEXANDER, JR., a witness called by and on behalf of counsel for the General Counsel, and having first been duly sworn, was examined, and testified as follows:

Trial Examiner: Your full name, Mr. Alexander.

The Witness: Charles E. Alexander, Jr.

Direct Examination.

Q. (By Mr. Kossoff.) State your address for the Trial Examiner, Mr. Alexander.

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A. 5700 Roeland Drive, R-o-e-l-a-n-d, Mission, Kansas.

Q. What is your present occupation? A. I am assistant to the director of the Iron Ship Builders International Marine Council, a unit of the International Brotherhood of Boiler Makers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers Union.

Q. How long have you held that position? A. Since September 1, 1961.

Q. And what position did you hold before that? A. I was a staff representative of the International.

Q. And how long did you hold that position? A. Since September 15, 1950.

Q. Were you present at negotiating sessions between American Ship Building Company and a group of eight craft unions between June 6, 1961 and October 27, 1961, Mr. Alexander? A. Yes.

Q. What capacity did you serve in at those negotiations? A. I was selected as chairman of the negotiating group for the eight unions.

Q. And will you tell the Trial Examiner, Mr. Alexander, so he will understand the nature of the setup of the bargaining here, why it happened that there were eight unions that you were representing? Why eight unions? A. Well, there are eight union signatory to the contract with American Ship Building Company. There were four plants,

and these eight unions negotiate jointly with the Company and they selected me as the spokesman or chairman of the negotiating committee.

Mr. Kossoff: Will the reporter please mark this General Counsel's Exhibit No. 4 for identification?

(Whereupon the document above referred to as General Counsel's Exhibit No. 4 was marked for identification.)

Q. (By Mr. Kossoff.) Is this the agreement that you referred to that the craft unions were signatory to with American Ship Building Company? A. Yes.

Mr. Kossoff: At this time, Mr. Examiner, I ask that General Counsel's Exhibit No. 4 for identification be received in evidence.

Trial Examiner: Any objection?

Mr. Cavano: No objection.

Q. (By Mr. Kossoff.) Will you tell the Trial Examiner when that agreement expired? A. The expiration date was August 1, 1961.

Trial Examiner: Was this the agreement you were re-negotiating when this dispute, in quotes, whatever it maybe, occurred? You were re-negotiating?

The Witness: That is the agreement we were re-negotiating.

Trial Examiner: General Counsel's 4 is admitted into

evidence.

(The document heretofore marked as General Counsel's Exhibit No. 4 was received in evidence.)

Q. (By Mr. Kossoff.) And were you selected as chairman of that negotiating committee? A. Yes.

Q. And whom did you represent? The eight craft unions? A. I was acting as spokesman for the eight craft unions, yes.

Q. Did the Company and Unions exchange proposals earlier in 1961? That is, before June sixth? A. It is my understanding that the Company and the Unions did exchange contract proposals by mail.

Q. Do you know whether that occurred in May of 1961? A. I am not sure of the date.

Mr. Kossoff: Could we get a stipulation that it occurred in May of 1961?

Mr. Cavano: May 23rd and May 26th.

Q. (By Mr. Kossoff.) On May 23rd the Company sent its notice of a desire to modify the agreement and submitted a list of its proposals and on May 26th the Union submitted its proposals to the Company? A. Correct.

Trial Examiner: I note the stipulation. Proceed.

Q. (By Mr. Kossoff.) Had you ever before attended negotiat-

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ions between Respondent and the group of eight unions? A. I have never attended any negotiating meetings prior to June 6, 1961.

Q. And that is in any contract between Respondent and the group of eight? That is in any earlier negotiating either? A. That's right.

Q. Will you tell the Trial Examiner in your own words who was present at the—? Well, first, who was present at the first negotiating session on June sixth? A. Well, the Unions. There was representatives from the Buffalo yard representing the Boiler Makers International Union, Mr. Dejack and Mr. Alex Getes.

Q. Business representatives? A. Mr. Dejack is business representative; Mr. Getes was a committeeman from Lorraine. There was Mr. Joseph Sextella and one committeeman from his union for the first negotiation session. I don't remember his name. From Toledo there was assistant business representative of that local and one committeeman, Mr. Henry Bronburn from South Chicago. Our Hammond local there was Mr. Dave Peterson, business manager; Leo Grambo, assistant business manager; Tom Delaney, committeeman; and there was two representatives from Carpenters Union, one representing the International, a Mr. Crawford, and one representing the local union in Lorraine. Off hand I can't remember his name. There was an international representative from

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the Electrical Workers, and I think one representative from Toledo or Lorraine. There was a representative, I

believe, from the Pipe Fitters Union in Lorraine and there was no representative at that first meeting from the Painters nor the Operating Engineers.

Q. Other than the Painters and the Operating Engineers all other crafts were represented? A. To the best of my recollection, yes. For the Company there was Mr. Midnight, executive vice president, the American Ship Building Company; Mr. Cavano, Company's attorney; from Buffalo, New York yard was Mr. Thulman, plant manager; from Lorraine, Ohio Mr. Trace, plant manager; from Toledo Mr. Knapp, plant manager; and from South Chicago Mr. Alex Dalrymple, plant manager. I believe there was another representative from Lorraine. I think he was the personnel director of Lorraine, and I think there was also a personnel representative from Toledo.

Q. Was this generally the makeup of the negotiating committees throughout the various sessions that were held? A. Yes, generally that was the people representing the two groups.

Q. And were you present yourself at every meeting? A. Yes.

Q. Where was this first meeting held on June Sixth? A. It was held in the Sheraton Cleveland Hotel in Cleveland,

Ohio, Room Six.

Q. Now, in your own words, Mr. Alexander, tell the Trial Examiner what happened at this first meeting. A. Well, to the best of my recollection, we discussed the various proposed changes. Primarily, at the first meeting I think we discussed the Unions' proposed changes, giving reasons for the requested changes, and spent practically the whole session on June 6 doing that. Prior to the—. Well, the beginning of the meeting I stated that it was my understand-

ing that in the past there seemed to have been a strike at every—during every negotiation since World War II from information I had received, and it was our sincere hope that we could negotiate this agreement—go through those negotiations and negotiate a new agreement without any strife., that personally I always had a strong dislike to strike and that I thought if two parties sincerely desired to reach an agreement, one could be reached without strike. The Company—I think it was Mr. Cavano—stated that the Company concurred in those thoughts, that they too disliked strikes, and it was their hope, also, that an agreement could be reached amicably.

Q. In your statement was there anything said about the Union's intent in this respect?

Mr. Cavano: Objection to the form of the question.

Trial Examiner: What basis?

Mr. Cavano: Objection to the form of the question. I

don't know what is meant by the word "intent." Maybe the witness understands it. Let him answer.

Trial Examiner: I'm not sure either. I will sustain the objection. You can be more specific.

Q (By Mr. Kossoff.) Do you have any recollection of anything else that you said in your opening statement? A. Yes, I said that we were going to do everything that we possibly could to prevent any necessity for a strike, that we would make every effort to complete negotiations amicably.

Q. Who is the chief spokesman for the Company? A. Well, Mr. Cavano was the counsel for the Company, and I believe that he did most of the speaking for the Company.

Q. And what was—was that at every session? A. Yes.

Q. When was the next meeting held, Mr. Alexander? A. Well, we had three meetings at that time; June 6th, 7th, and 8th.

Q. And would you tell the Trial Examiner what happened at these meetings of June 6th, 7th, and 8th? A. Well, if you mean what happened, we didn't reach an agreement, to the best of my recollection, on any of the items that were proposed by either side. We thoroughly discussed them, and we got a very good understanding as to the proposal being made by each side and the reasons for those proposals.

Trial Examiner: You say you reached no agreement on

6, 7, and eight?

The Witness: I don't recollect that we agreed to anything during those first three days of meetings.

Trial Examiner: I wasn't sure I heard you. Go ahead.

Q. (By Mr. Kossoff.) Were various contract clauses and the language therein discussed at these first three meetings? A. Yes. As a matter of fact, we discussed all of the proposed changes in the contract language and the fringe benefits being requested by the Union as well as the proposed changes by the Company.

Q. When did the next meeting take place, to the best of your recollection, Mr. Alexander? A. I think it was June 19th and 20th.

Q. Do you recollect what happened at the 19th and 20th meetings? A. Well, we continued our negotiations discussing the various proposals. I would have to check my notes to see whether we actually did accomplish anything during those meetings, agreed to anything because that has been some time passed; and if there'd been no objections, I—.

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Q. (By Mr. Kossoff.) Directing your attention to July 6, 1961 meeting, did the subject of federal mediation conciliation arise? A. July what meeting?

Q. July 6, 1961. A. Yes. We had met July 5th, and I thought that we had made quite a bit of progress in the agreement in change of language and numerous articles on July 5th, and then we met again on July 6th, but apparently we did not agree on too many items on July 6th and the Company suggested that perhaps we should call in federal mediation and conciliation service.

Q. What did you say when the Company suggested this? A. Well, I stated that I feel that the two parties could do much better negotiating across the table without outside help, that I had no objection to calling in federal mediation—

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conciliation service, but it's been my experience that a lot of times they will separate the parties when you don't actually do any negotiating. All you do is send proposals back and forth.

Q. Did you say this to the Company at that meeting? A. I expressed that at that meeting.

Q. Did the Company say why they wanted federal mediation and conciliation? A. I think Mr. Cavano stated he felt it was necessary to have federal mediation and conciliation service. We were still very far apart on final agreement; we hadn't really gotten into any of the fringe benefits or monetary items, and it was his thought that we should have them in.

Q. Did he say anything about why he wanted it at that particular time? A. If I recall correctly, I think Mr. Cavano said at that time that if we were going to reach an agreement before the expiration date, that he felt it was necessary we have conciliation.

Q. And did he give any reason why he wanted to reach an agreement before the expiration date? A. I don't remember whether it was that meeting or not, but I think it was that the Company said that they wanted to know whether they'd have an agreement at the expiration date because of the necessity for bidding on work that was

to be left and they wanted to know whether they would have an agreement or not.

Q. And what did you or any members of your committee reply to this statement by the Company? A. I think I stated—what I stated on so many occasions; that as far as we were concerned, there was no reason why we couldn't reach an agreement.

Mr. Cavano: Excuse me, Mr. Alexander. I'm sorry, but I think I'd like to specifically date this conversation and not many times thereafter. We are talking about a specific time.

Trial Examiner: What we want to know is during the July 6th meeting after the discussion or the suggestion that the Company had bidding problems was made and they wanted to reach an agreement by expiration date. What did you say in response to that?

The Witness: I said we certainly wanted to reach an agreement, too, by the expiration date; that the experience in the past we did not want to go through again, we did not want continual strikes at each negotiation; that this was

one negotiation that I was hopeful that we could complete without a strike in that we definitely did not intend to have a strike.

Q. (By Mr. Kossoff.) Now, before we were interrupted by Mr. Cavano, I believe you were answering the question as to what you or your committee members replied to Mr. Cavano's

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statement about not being able to bid on particular jobs.

Now, was there any reply made by your committee members to this? A. Well, we told—. I said and several of the committee members said insofar as we were concerned, there was no reason why the committee could not bid on—.

Q. Did any committee members go further in regard to guaranteeing work? A. I don't remember whether it was the July 6th meeting or not. I believe it was when Mr. Francis Dejack from Buffalo definitely stated, and he stated on several occasions after that, that insofar as the Buffalo yard was concerned, they would complete any work the Company got or took, and it's my understanding that the assistant business manager of Toledo stated the same thing, as well as the assistant business manager from South Chicago, Lee Brambo.

Q. Did the Company talk about getting work in and not taking work and not being able to get it out in the event of a strike? A. I think that came up at a later meeting.

Q. Now, did anybody in the room do anything in relation to the matter of calling federal mediation and conciliation? A. Well, after we told the Company that we had no objections to calling federal mediation conciliation in, I think it was Mr. Cavano that went to the phone on the wall in the meeting room and called conciliation office in Cleveland and tried to

arrange for federal mediator to be with us at our next meeting and set up a meeting for the two groups.

Q. And when was the next meeting set up for? A. If I recall correctly, it was July 18th or 19th.

Q. At the July 18th or 19th meeting which you just referred to, did the Union offer any proposals to the Company? A. Yes, I believe we did, but to remember the specific proposal, I would have to check my notes.

During that 18th and 19th meeting, we were meeting across the table from each other from time to time, and then the conciliator would separate us and proposals would go back and forth through the conciliator.

Q. Do you presently recollect the nature of the proposal that you made to the Company? Do you fairly recollect that without referring to your notes? A. No, I don't think I can.

Q. Do you recollect, Mr. Alexander, whether or not anything was said in regard to an extension at that time, an extension of the agreement? A. I believe at one time the conciliator told us—.

Mr. Cavano: Objection.

Trial Examiner: What is the basis?

Mr. Cavano: We are talking about July 19th, and the witness is answering, I believe the conciliator said one time. I think it's important in this case that we have these dates

correct. Very important.

Trial Examiner: Well, I'm troubled about the fuzziness of it other than the date. It doesn't seem to be responsive. You want to know what the witness proposed.

Q. (By Mr. Korsoff.) Yes. What did you propose, if anything, in regard to an extension of the agreement on July 19th? A. We proposed to the Company a six-month extension of the contract as one proposal.

Q. What was the reply of the Company to your proposal for a six-month extension of the contract? A. The Company stated that they couldn't accept it because that would put them in the busiest season of the year for them and they didn't feel that they could accept it.

Q. Did you attach any conditions to your offer to extend the contract? A. No.

Q. Did Respondent counter with any counter-offer in respect to your offer to extend the contract, either asking for a shorter or a longer extension? A. No.

Q. I direct your attention, now Mr. Alexander, to the July 31st and Early morning August 1st meeting. Will you describe for the Trial Examiner, please, what occurred at this meeting, taking it from the beginning as well as you can remember?

A. Well, we had gotten down, at that time, to about five or six issues; principally, monetary items and fringe benefits. I think the principal issues was pension plan, across-the-board increase, guaranteed paid holidays, improvement in the hospitalization, surgical, and medical benefits, a health and welfare plan covering life insurance and sickness, accident, weekly benefits, and duration of agreement.

At that time, the Company was requesting a three-year agreement; the Union was insisting on a one-year agreement. We had met all day on these items, and in the early hours of the morning of August 1, the Union again proposed —gave a counter proposal to the Company on the fringe

benefits, wages, and an alternative proposal of a six-month extension of the contract.

Q. So, there were actually two proposals? A. Two proposals. One was on the items at issue and the other was a six-month. If we couldn't agree on the items at issue, then the alternative was to extend the agreement to six months.

Trial Examiner: Extend the present agreement for six months as it was?

The Witness: Yes.

Q. (By Mr. Kossoff.) Did the Respondent reply to your proposals? A. They rejected it.

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Q. Both of them? A. Both of them.

Q. All right. What happened after that? A. We then asked the Company if they would extend the agreement—the present agreement until such time as we reached a new agreement, and the Company's reply to that was that they did not feel they could extend it even for one day. I suggested that, as spokesman because the Company had given us a proposal, that they wanted us to take back to the membership for their acceptance or rejection, and we requested that the Company extend the agreement at least through that period until we could bring it back to the membership or extend it indefinitely until such time as we reached a new agreement with whatever being reached being retroactive to August 1st.

Q. And they rejected both? A. And they rejected both.

Q. After rejecting these offers of yours, did the Company say anything or ask you any questions at that time with respect to striking? A. Yes, the Company wanted to know if we were going to close their plant down the next morning. I think Mr. Cavano asked the question, and I told him no. We had said consistently we weren't going to

have a strike; we didn't intend to strike; and we weren't going to strike. Any number of times during our meetings with the conciliator the conciliator, on several

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occasions, told us that the Company was concerned about having a strike at the plant, and we told the conciliator that the only ones who seemed concerned about a strike was he and the Company; that we had never threatened to strike; we had no intentions of striking in the Company.

Q. Mr. Alexander, you stated that the Company asked you to submit its proposal to the membership? A. Yes.

Q. Did the Company take any steps on its own, to your knowledge, to submit the proposal itself to the membership? A. Well, I didn't attend any of the membership meetings, but at our next meeting called by the conciliatory, it was called to my attention the Company had distributed the proposal in letter form to the employees of the various plants.

Q. Had they informed you at that August 1 meeting that they would do so? A. No.

Mr. Kossoff: Would the reporter mark this as General Counsel's Exhibit No. 5 for identification?

(Whereupon the document above referred to as General Counsel's Exhibit No. 5 was marked for identification.)

Q. (By Mr. Kossoff.) I show you General Counsel's Exhibit No. 5 for identification and ask you to examine it. A. This is a copy—duplicate of a copy shown to me by some of our representatives.

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Mr. Kossoff: At this time, I offer General Counsel's Exhibit No. 5 for identification into evidence.

Trial Examiner: Any objection?

Mr. Cavano: No objection.

Trial Examiner: There being no objection, General Counsel's Exhibit 5 is admitted into evidence.

(The document heretofore marked as General Counsel's Exhibit No. 5 was received in evidence.)

Trial Examiner: It is a letter dated August 1, 1961.

Q. (By Mr. Kossoff.) What time did your meeting adjourn? A. I think it was about 3:15, ?.30 on the morning of August First.

Q. And that was the day that the contract expired? A. That's correct.

Q. Was it expired on midnight of July 31st? A. Yes.

Q. And did you go out on strike on that day? A. No.

Q. Did you ever go out on strike? A. No.

Q. Did you meet again on August 8, 1961? A. Yes. We met on August 8th to inform the Company and the conciliator of the actions taken by the members of the various unions in the various plants.

Q. And what were the results of the meeting?

A. The results were overwhelming rejection of the Company's proposal. There was two proposals, actually. They were both rejected.

Trial Examiner: I missed something, Mr. Alexander. You met on August 8, 1961 with whom? With the Company?

The Witness: With the Company and the conciliator.

Trial Examiner: To tell them the results of the poll?

The Witness: That's right.

Q. (By Mr. Kossoff.) Was anything said about striking on that day? A. The Company asked us why we didn't strike, and I told that we had insisted that we never intended to strike. We had consistently said we weren't going to strike.

Q. Was the next meeting on August 19, 1961? A. Beg pardon?

Q. Was the next meeting after the 8th meeting on August 19, 1961? A. Yes.

Q. Did anything happen between the August 8th meeting and the August 19th meeting that was a subject of discussion at the August 19th meeting? A. What was that question?

Q. Directing your attention to General Counsel's Exhibit No. 2, Mr. Alexander, does that refresh your recollection as to anything that happened between the 8th meeting and the August

19th meeting?

A. Yes, we bitterly objected to the Company—the layoff slips they had given to their employees stating that they were being laid off because of a labor dispute, and we asked the Company how there could be a labor dispute when our people were still working for the Company in those yards where the Company had work; that we had not struck the plant; that we had not put up any picket lines; and those people they had jobs for were working and that we strongly objected to the Company laying off the people to deprive them of their unemployment compensation by stating they were being laid off because of a labor dispute, and we insisted there was no labor dispute.

Mr. Cavano: I am going to object to the entire answer and ask that it be stricken for the reason the time, the date, the place, to whom, and who heard this conversation was not related. This is a general statement of something that is supposed to have happened between the 18th of August and the 19th of August, and there is no evidence on the part of this witness that any representative of the Employer heard any such statement.

Trial Examiner: I understand that this was supposed to be at the August 19th meeting.

The Witness: That is correct.

Mr. Kossoff: That is correct.

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Trial Examiner: Will you fix it where it was, who said it?

The Witness: I said it.

Trial Examiner. I'm not talking to you. We all want this record to be clear, if it's going to be clear, if that's possible. But at the beginning of the witness's answer, I am talking about, Mr. Kossoff, he said the Company said. That is not completely meaningless, but it could be tied down better; if there's a spokesman for the Company, we ought to know about it.

Q. (By Mr. Kossoff.) All right. Directing your attention to the August 19th meeting, Mr. Alexander, was this statement which you just made as to what you said and what the Company said—was this statement made at the August 19th negotiating meeting? A. Yes. It was called to my attention by the various representatives of the various unions that the Company had given the employees layoff slips. They showed me some of the layoff slips denoting that they had been laid off because of a labor dispute, and

I certainly expressed my objections to the Company at that time about giving those people layoff slips because of a labor dispute, and we were sitting down negotiating or trying to negotiate an agreement.

Mr. Cavano: I am still objecting to the answer, Mr. Examiner.

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Trial Examiner: Objection overruled.

Mr. Cavano: I still haven't heard who heard it.

Q. (By Mr. Kossoff.) You stated what you said. Now, did the Company respond to your statement? A. Mr. Cavano told me in front of both committees that he felt that they were within their rights in what they were doing; that he had several cases that he could quote where the unemployment bureaus of states had refused compensation because of similar circumstances, and one that he mentioned was the Maryland Dry Docks in Baltimore, Maryland, and that was at the meeting on the 19th and everybody heard it sitting in that room including the conciliator.

Q. Now, Mr. Alexander, what was said at this meeting about the Company taking work in and getting it guaranteed? Did the business representative—? A. The Company said that they had to lay off the employees because they had no work for them; they couldn't take any work because they didn't know whether they were going to have a strike from day to day or not. I again informed them that I had consistently stated that we had no intention of striking their plants; that we were going to continue working until such time we reached an agreement.

Q. Did the committeemen say anything from various locals at this time about the work? A. I distinctly remember Francis Dejack looking across the

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table to Mr. Fomantota, any work he wanted to—and he guaranteed it was done in Buffalo. I think Mr. Rambo from Hammond and Jim Kogin from Toledo said the same thing.

Q. By Hammond you mean South Chicago? A. South Chicago, yes. I say Hammond because that's where our lodge is located.

Q. At the August 28th meeting that was the next meeting, August 28, 1961, approximately that date? A. Yes.

Q. Did the subject of unemployment compensation again arise at the August 28th meeting; and if so, what was said and who said it? A. A. F. Young, director of the Iron Ship Building Internation Marine Council, was at that meeting.

Q. He wasn't at all meetings, was he? A. He was not at all meetings, no, but he was at that meeting, and he strongly protested the Company's position in laying off the employees because of a labor dispute and depriving them of their unemployment compensation. He told them in his opinion it was a silly thing for them to do, among other things, and one was that that was not a good way to improve labor-management relations.

Q. Did the Company say anything in explanation of its conduct and who said it? A. The Company said that they felt they were fully within

their rights in what they had done and that was expressed by Mr. Cavano.

Q. And did he say why? Did he say that he had any fears in relation to getting work out? A. He said that the Company couldn't—wouldn't bid on any jobs and turned down a number of jobs, and I don't remember the names of the jobs, but I think Mr. Midnight named some jobs that

had—the Company said they couldn't take and that a number of shipping companies wouldn't give any work because they're afraid to put it in the yard, afraid they might have a work stoppage after the jobs got in the yard.

Q. What did the Union reply to this? A. We said we hadn't struck up to that point; we had no intention of striking; as a matter of fact, we were still working the full force in the Lorraine, Ohio yard. I think there was over several hundred men working there.

Q. Did the business representative say anything about taking work? A. I don't remember at that meeting whether they did or not.

Q. Did you tell the Company that they could take all the work they wanted to? Do you recollect whether—? A. Well, I'm sure I said to the Company that I saw no reason why they couldn't take any work; that we were working on the work they had; in my opinion there was no reason why they shouldn't take any additional work; we hadn't stopped

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any work that they had and had no intentions to.

Q. Excuse me. I didn't mean to cut you off. Are you finished? A. Yes.

Q. Now, at this August 29th or August 28th meeting, the date is not exactly clear, did the Company submit any kind of a proposal to the Union? A. On August the 28th?

Q. Or 29th. Was there a meeting on the 29th? A. Yes.

Q. This was another meeting the next day? A. Twenty-eighth and 29th.

Q. What happened at the August 29th meeting in reference to any proposal submitted? A. The Company—. Well, we submitted back and forth several counter propo-

sals, and I think it was the August 29th meeting when the Company gave us what they call their final proposal and we requested if they insisted on us taking it back to the membership, that the Company put it into writing because there had been some statements or rumors that some of the representatives had not taken the Company's previous proposals back to the membership as they were given by the Company. We asked that they be put in writing by the Company in its Company's own language, given to the various Union representatives in the various localities so they could take it back

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to the membership just as the Company had given it to them.

Q. And did the Respondent present this to the Union representative? A. Well, it took several days to draw it up. I think it was September 1st or 2nd or 3rd before the representatives received it.

Q. I show you what the reporter marked—.

Mr. Kossoff: Would the reporter mark this document as General Counsel's Exhibit 6 for identification?

(Whereupon the document above referred to as General Counsel's Exhibit No. 6 was marked for identification.)

Q. (By Mr. Kossoff.) I show you General Counsel's Exhibit 6 for identification. A. That was the Company's proposal.

Q. This is the proposal of the Company submitted to the Union in writing? A. Yes.

Q. Did the Company follow the procedure exactly as agreed to at the August 29th meeting in reference to submitting copies of the proposal to the Union? A. They fol-

lowed that part of it, but they went further and distributed it to the employees as well as to the representatives of the Unions. I received complaints that some of the employees received them before the representatives of the Union did. I think that was particularly true in the Buffalo

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area.

Mr. Kossoff: I offer General Counsel's Exhibit No. 6 for identification into evidence as General Counsel's Exhibit No. 6.

Mr. Cavano: No objection.

Trial Examiner: General Counsel's Exhibit No. 6 is admitted into evidence.

(The document heretofore marked as General Counsel's Exhibit No. 6 was received in evidence.)

Q. (By Mr. Kossoff.) Did the membership vote on General Counsel's Exhibit 6, September 1st proposal that is dated September 1st? A. Yes.

Q. And what were the results of this vote? A. The proposals were rejected. In three instances, Toledo, Lorraine, and Buffalo. The members of the Boiler Makers International Union rejected it and made a counter proposal accepting part of the Company's last proposal with the exception of the expiration date and with the exception of the expiration date and the hospital, surgical, medical benefits. The Unions wanted the effective date of the agreement to be the date of signing, and the hospital, surgical, medical benefits to become effective immediately an employee went to work for the Company.

Q. When was the Respondent notified of the results of the

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balloting on its final proposal? A. At our next meeting, which I think was September 18, 1961.

Q. And was the Company at the September 18th meeting notified of the areas of agreement and the areas in which the Respondent and Union were apart? A. Yes.

Q. And is it true, then, that on the basis of your previous testimony that they were informed that only on these two points; namely, effective date of agreement and hospitalization, were the Union and Company apart at the September 18th date? A. At that time, the Company was informed that those were the only two items on which we were apart.

Q. Was Mr. Young present at the September 18th meeting? A. Yes, I think he was.

Q. Did he make a statement about unemployment compensation at this meeting? A. That came up at every one of our meetings and it came up at every meeting he was at after the first lay off, after the lay off of the employees.

Q. Did he make a statement as to what he would do in order to get unemployment compensation? A. If I remember what Mr. Young said correctly, he told the Company that we intended to do everything within our power

to get the unemployment compensation for the employees of the Company even if we had to go to court to do it.

Q. Did anything come up at that meeting with respect to hospitalization benefits? A. I think we discussed at that meeting a compromise on hospitalization benefits. The Company was objecting to employees being immediately covered for hospitalization, medical, surgical benefits. We discussed that quite a bit.

Q. Were the employees deprived of hospitalization benefits during the time they were laid off? A. Well, the first

month of their lay off I believe that the great majority were covered, but that was for August; but since they were not working in September, they were not covered, and the Company said they could not pay premiums on those employees who were laid off for the month of September and would only pay the premiums on those that were working.

Q. Were the next meetings held in October of 1961? A. We met on September 18th and I believe the next meeting was October 21st.

Q. Did you meet several days in a row in October 21st? A. We met October 21st and October 22nd, reaching a final agreement on October 22nd. That is an agreement that the committee felt that the membership could accept. It had to be taken back to the employees.

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Q. Was anything said in reference to the Company's stand on unemployment compensation at this October 22nd or 21st meeting, whichever the last meeting was? A. If we reached a tentative agreement, the Company said it would withdraw its objection in the State of New York and the State of Ohio to the unemployment compensation being made in those states. It did not know whether it could withdraw its objections in the State of Illinois. It said if the Company and the employees could be paid, then it would. If they could not do that, then they would do anything they could to be helpful in securing the unemployment compensation to the employees in Illinois.

Q. Did they condition their action with respect to withdrawing protests and appeals on any conduct on the part of the Union? A. That was one of the conditions of reaching an agreement on the other two items. If we reached an agreement on the other two items, the Company said they would do this.

Q. In other words, if you signed the agreement as they wanted it, they would withdraw their protest and appeals on unemployment compensation? A. They didn't say if you sign it the way we want it; they said if you accept these two things and we reach a final agreement, this we will do. They hadn't agreed to do it prior to that.

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Q. Now, Mr. Alexander, was the only difference between the final offer made by the Company, the offer finally accepted by the Union that the effective date was changed by two weeks; namely, from August 1st to August 15th, and that the demand for immediate coverage for hospitalization for employees was to take effect instead—was to take effect after employees were called back worked 40 hours or would you tell in your own words the only difference between the final offer of the Company on August 29th, General Counsel's Exhibit No. 6, and the agreement as it finally was reached? A. Well, the agreement as it was finally reached was not immediately coverage such as the Union had been asking for. It was based on a man being employed by the Company 40 hours and after he had completed 40 hours of work for the Company, he would then be covered by the hospitalization, medical, surgical plan, and on that—that was—the change on that was the expiration date was a matter of 15 days from the Company's position. They wanted August 1st, and finally agreed to August 15th.

Q. But other than those two changes, the final proposal of August 29th and the final agreement reached and signed October 27th were identical? A. Except for those two changes.

Q. By the way, were the agreement—was the agreement signed on October 27, 1961?

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A. Yes, I believe it was October 27th.

Q. Now, where employees were not locked out, Mr. Alexander, did they continue to work without resorting to strike? A. Yes.

Mr. Cavano: Objection.

Trial Examiner: To the form?

Mr. Cavano: Yes.

Trial Examiner: Sustained.

Q. (By Mr. Kossoff.) Where employees were not laid off, did they continue to work without resorting to a strike? A. Yes.

Q. Were any employees who were laid off on August 11th recalled at intermittent intervals during the period between August 11th and October 27th? A. I had no personal knowledge of that other than what the various representatives in the various yards told me, that there were occasions when laid-off employees were called back for shorter periods of time. In some cases two or three days, some cases longer.

Q. Do you know whether these employees ever refused to return to work? A. To my knowledge, no.

Q. Did the Company, at any time during the negotiations, ask the Union for assurances that it would not strike or assurances that the group of eight would not strike?

A. No.

Q Or ask for assurances that any craft would not strike? A. No.

Q. Did the Company, at any time during negotiations, ask the Union as to being given notice that it would be given —strike that. Did the Company, at any time, ask the Union

whether or not it would receive notice in case the Unions decided to go out and strike? A. No.

Q. At any time during the negotiations, did the Respondent ask the Unions whether work and progress could be completed in the event of a strike? A. I don't remember that they did. As a matter of fact, there was work in progress at the expiration of the agreement, and it was completed.

Q. Did the Company ever ask for an extension of agreement at any time during the negotiations? A. No.

Mr. Kossoff: I have no further questions.

Mr. Mamet: I just have one question.

Trial Examiner: Go ahead.

Q. (By Mr. Mamet.) Apart from the statements attributed to Mr. Midnight on behalf of the Company, your answers were the Company said this and the Company said that. Can you identify any individual in the Company who made these state-

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ments? A. Which statements are we talking about?

Q. Well, most of the time you said the Company said this throughout your whole testimony. A. If I said the Company, I meant Mr. Midnight or Mr. Cavano, who were speaking for the Company.

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CHARLES E. ALEXANDER, JR.:

Cross-Examination.

Q. (By Mr. Cavano.) Mr. Alexander, will you tell us please who assigned you to the position of representing the

International in its problems with the American Ship Building Company? A. International president.

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Q. Do you recall a meeting in Chicago on or about December of 1960 attended by yourself, Mr. Midnight, the executive vice-president of the American Ship Building Company, and Mr. Hoffmann, vice-president of the American Ship Building Company? A. Yes.

Q. Do you recall the— A. It wasn't a meeting. It was a luncheon engagement, and we discussed matters that the company felt they wanted to discuss at that time.

Q. And was this meeting at the request of the company, Sir? A. Mr. Hoffmann.

Q. And he is with the company, isn't he? A. He was with the company at that time.

Q. And what gentlemen did this discussion include? What was the conversation about? A. The conversation was about some new construction work

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that the company wished to bid on, and they felt that if they could meet with the unions and come to an agreement at the earliest possible date they would be in a better position to submit bids on new construction work that was contemplated being let by various companies with ample subsidies.

Q. Was there anything else in this conversation that you can recall other than the bidding? A. The company requested an early meeting with the unions if possible to negotiate an agreement prior to the regular expiration date of the existing contract.

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Q. Do you recall having said that this survey would be finished sometime after the first of the year and that at that time, when your survey was completed, you would be glad to discuss the question of reopening the contract at a earlier date? A. No. What I said was that I could not agree with the company to reopen the contract at a earlier date; that I

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would have to discuss that with our local unions, and it also had to be discussed with the other unions signatory to the contract because it would take all parties to negotiate a new agreement.

I do not remember going into details as to conditions to be discussed in a new contract or any other articles of the agreement to be discussed.

Q. Did you thereafter have a further conference in the City of Buffalo on or about February 20, 1961, with Mr. Midnight, at which time he was asking again for an early reopening of the contract and had asked whether or not you had completed the survey of the wage rate on the Great Lakes at that time? A. I remember meeting Mr. Midnight again, and probably it was February of 1961; but it was not on that matter.

It was on grievances in the Buffalo yard. Mr. Midnight did ask me if I had done anything about the getting together of our people and the probability of an early opening of the agreement.

I told him that we were going to have a meeting of our Great Lakes District Marine Lodge, and I would bring the matters up to the representatives of our four unions at that time and discuss it with them.

Q. Did you thereafter have a convention of the Marine Lodge in Long Beach, California in 1969? (sic.)

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A. We had a convention of the International Union in Long Beach in 1961, not a convention of our District Marine Lodge.

Q. And at this convention did you have a meeting of a subgroup, for example, of the Marine Lodge itself? A. We had a committee of all ship yard lodges and Navy yard lodges throughout the International Union to discuss the problems of the ship yards and Navy yard problems and make a report to the convention; but not a meeting to discuss problems in the Great Lakes as such.

Q. Before being assigned to these duties, Mr. Alexander, did your superior bring you up to date with reference to any strikes or work stoppages at the American Ship Building Company prior to the time that you took over? A. President Calvin did not discuss the matter with me at all.

Q. Were you familiar with the strikes and work stoppages that had occurred before? A. Only from what I heard from the company and the union representatives representing our lodges in the area.

Q. And did these representatives of the lodges in the area tell you how many strikes there had been prior to August the 1st of '61?

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Q. (By Mr. Cavano.) Mr. Alexander, were you told by representatives of the locals prior to entering negotiations with this company in June of '61 that there had been a strike in 1958 lasting about ten weeks at the American Ship

Building Company? A. Several of them informed me of a strike that had lasted thirteen weeks.

I understand that the crafts were out eight weeks; they settled with the company, and then the machinists struck the yard for an additional five weeks.

Q. You are familiar then that in addition to a contract with the group of eight unions whom you represented as chairman that the company also has a contract with the machinists union, with whom the negotiates separate?

A. Yes.

Q. Now, directing your attention to the first meeting between the unions and the company at the Sheraton-Cleveland Hotel on June 6, 1961, do you recall a general statement made by Mr. Midnight explaining the fact that the other ship building companies on the Great Lakes had wages as high as forty-two cents per hour higher than what the American Ship Building Company was paying? A. No, I understood that some of them had wages lower than the American Ship Building was paying, but not higher.

Q. I mean lower. Thank you. Quite a bit lower, as high as forty-two cents per hour lower? A. I think Mr. Midnight stated there was one yard that had wages that much lower; yes.

Q. Did he also explain the condition of the ship building industry on the lakes as a whole with reference to the fact that there was a good deal of foreign ship building going on which was taking business away from the company? A. Mr. Midnight stated that; yes.

Q. Did he also talk about the importation of iron or—from foreign countries having an affect upon the ship building industry upon the Great Lakes? A. Mr. Midnight made that statement.

Q. Did he also discuss the import of the fact that a

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number of ships were being built in European countries instead of in the United States ports and that this too was having an adverse effect upon the industry as a whole? A. Mr. Midnight made that statement.

Q. Did he not say further that because of the great disparity in wages between the American Ship Building Company and the other ship yards on the Great Lakes, plus these other conditions, that the company hoped to negotiate an agreement whereby the other companies would be required to bring their rates up to those of the American Ship Building Company: and that as soon as that happens that the agreement could be reopened immediately upon the subject of a wage increase? A. I don't think I quite understand the question. I think you confused me in the beginning.

Q. Did Mr. Midnight not say at this meeting on June 6 that the disparity in the wages and the condition of the industry generally was such that in order to meet this kind of competition the company had to keep its wages constant at least until such time as its competitors' rates equaled those of the American Ship Building Company? A. That statement Mr. Midnight made, not the first one you put.

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Q. Do you recall, Mr. Alexander, that on June 20, 1961, when these fringe items were mentioned, that recess was called and after the recess the company came back into the meeting and explained to the unions that the fringe benefits that the unions were requesting amounted to twenty-

eight and three quarters cents per hour without even discussing a question of a wage increase?

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A. That is correct. However, the unions did not agree on the figure with the company.

We thought it was lower.

Q. Do you recall how much lower you thought it was? A. We thought it ran around twenty-one and twenty-two cents.

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Q. And isn't it true that at that meeting on June 20 the condition between the company and the union became quite strained? A. I don't think at any time during our negotiations did conditions become strained between the union and the company, as I know the meaning of strained in negotiations.

Q. On June 20, 1961, when these proposals were estimated by the company to amount to twenty-eight and three quarters cents, do you recall Mr. Midnight making a strong speech at that time to the effect that the unions apparently were not intending to co-operate with the company in this fight that it felt it had in order to meet competitive conditions on the lakes, and that if this was the kind of bargaining that the company was going to have to continue to do, that it would be best if perhaps we suspended for a day or two and take another look at this situation.

Do you recall that, Sir? A. I recall Mr. Midnight saying that apparently we

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weren't paying any attention to his plea at our first meeting; that we leave the matter of wages and fringe benefits

status quo and that he did think that we were asking for an exorbitant increase.

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Q. Mr. Alexander, I am going to ask you whether or not at the meeting on June 23, 1961, which you were present, that a discussion took place to the effect that we apparently were not getting anywhere in our negotiations; that it would be a good idea for us to suspend to another date at which time the union was going to make some new proposals to the company for changes in the contract and had hoped that the company would do the same? A. During the meetings of those few days that we met, I remember that particularly; yes, but whether it was the

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22nd or 23rd, I don't remember.

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Q. Do you recall the next meeting on July 19, 1961, at the Sheraton-Cleveland Hotel? A. The next meeting was the 6th. You were talking about the meeting of the 5th and the next one was the 6th.

Q. Yes, we did meet on the 6th, Mr. Alexander. You are correct.

However, we met on the 5th then, and also on the 6th; did we not? A. Correct.

Q. And did—Was our next date July 19, 1961?

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A. Yes.

Q. And on this date was this not the first time that the union requested a wage increase of twenty cents per hour?

A. I think that was the time we made a specific proposal on wages.

Q. And was it not twenty cents per hour, Mr. Alexander? A. I believe it was.

Q. Was it or wasn't it? A. Yes.

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Q. Did you say that the company was crying about not being able to afford a wage increase and yet did you say that in 1958 the company used the same argument and that a ten or a twelve week strike ensued at the conclusion of which an eight cent an hour increase was granted for each of three years and that the company was still not out of business? A. Yes.

Q. Did you say, at that time, that you did not want to strike but that if it became necessary you would do so? A. I said that I did not intend to strike. We did not intend going on strike.

We did not want to strike; and we would not strike.

Q. Did you say that if it was necessary for you to strike you would do so? A. I said, and I have always said, that the strike to me is the very last resort. I avoid it at every opportunity.

I detest them, and I would not strike.

Mr. Cavano: May I get an answer to my question, please.

Trial: Will you read the question, and your answer counsel, please.

(Question read.)

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A. I did not say that. At no time during the negotiations did I say that.

Q. Do you recall the meeting on July 28, 1961, at the Conciliation Service when the company called your attention to the total demands of the unions which amounted to forty-two cents per hour and that there was still only three days to go before the agreement expired and that it was necessary for us to endeavor to reach an agreement before the contract expired? A. Yes.

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Q. Prior to August 1, 1961, you were asked by representatives of the company as to whether or not the local unions had taken strike votes? A. Yes.

Q. And do you recall when you were asked that question? A. I think it was—I thought it was the 28th.

Q. The 28th of July? A. The meeting of the 28th; yes.

Q. And do you recall your answer to that question, Sir? A. I said that the unions—taking our unions, because I couldn't speak for the others until I checked with them—but I thought that some of our unions had taken a vote on the official ballots of our International Union.

Q. And did you explain what the result of that vote was, Sir? A. Yes, overwhelmingly to take a strike if necessary. However, I also explained that it did not necessarily mean there would be a strike; that we did not want to strike, and we would not, under any circumstances, have one if it was preventable.

Q. To whom did you make this statement, Sir? A. To the—

Q. To whom?

A. To the companies' representative sitting across the table.

Q. I thought you said there was—this was at a meeting that took place before the Conciliator? A. No. I said this was at a meeting on or about the 21st.

Q. At which meeting was it, Sir, that you say an extension of the six months' agreement was made? A. The first time I think was the 21st or the 22nd. The second time—

Q. Excuse me. That was to whom? A. To the Conciliator.

Q. And the next time was when? A. The night of July 31, the morning of August 1.

Q. That was the second time? A. Correct.

Q. Is it true, Sir, that on the morning of August 1, 1961, face to face with the company you asked this question: "Will you extend the agreement?"

And did the company reply "no", and wasn't that the end of that conversation; and wasn't that period— A. I asked the question if the company would extend the agreement until such time as we reached an agreement until such time as reached—we reached an agreement with anything retroactive to August 1. The company said

"no". They did not feel they could extend the agreement.

Q. The company did, however, make two proposals to the unions for presentation to the membership on August 1, 1961; did they not? A. Yes.

Q. And these proposals were presented to the membership; were they not? A. Yes.

Q. At 2:30 in the morning on the 1st of August, 1961, was any agreement reached as to when there was going to be another meeting? A. I don't believe there was.

Q. Do you recall when the next meeting took place after August 1, 1961? A. I think we left the meeting of August 1, 1961, telling the Conciliator that we would bring the proposals back to the membership that the company had made and after we had received our answers from the membership we would contact the conciliator, and he could set up the next meeting.

And that was the way we left it on August 1.

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Q. (By Mr. Cavano.) I will hand you what has been marked for identification as respondent's Exhibit No. 4 and ask you whether or not you are familiar with that telegram and its contents? A. Yes.

Q. You are familiar with it? A. Yes.

Q. Do you recall that you and Mr. Young had a discussion with reference to this telegram? A. Not until after the telegram had been sent.

Q. But after it was sent were you made aware of it? A. He told me that Commissioner Sheldon had called him, told him that there was a probability of a strike and to do everything to prevent it.

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Q. Mr. Alexander, were you made aware of the telegram on the 2nd of August, 1961? A. Yes, I received a copy of it.

Q. You received a copy. As its international representative, do you know whether the representatives of the various local unions were—with which you are associated received copies of this telegram? A. I understand they did.

Q. (By Mr. Cavano.) Mr. Alexander, was a precipitous strike expected by the members of your locals on the 2nd of August, 1961? A. No.

Q. Was a strike anticipated by the International of the Boilermakers' Union? A. No.

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Q. Did not the company also propose a one year agreement from time to time through the negotiations, Sir? A. Correct.

Q. After Mr. Young's statement with reference to a one year agreement, did Mr. Midnight then say in the presence of Mr. Young and yourself and everyone else present, that if the union was interested in a one year agreement the company would be willing to enter into a one year agreement, if it would accept the No. 2 proposal that was made to the membership on August 1, '61? A. Yes.

Q. Do you recall that?

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A. Yes.

Q. And that was refused; was it not? A. That was rejected.

Q. Did you not, Sir, on August 8, 1961, make the statement that in the event there was an agreement reached between the parties that the new agreement would become effective as of the date of signing and not as of the expiration date of the old contract? A. I said on August 8th that it was our request that any agreement signed would become effective as of the date of the signing of the new agreement, because the company had refused to extend the old agreement and make anything agreed upon retroactive to the expiration date of the old agreement.

And because of that, then, we were going to insist upon the new agreement being effective as of the date of signing.

Q. And the first time that any such mention was made was after August 1, 1961; isn't that correct? A. That was our first meeting after August 1, 1961.

Q. And did not the company, at that time, say it would be impossible for the company to have a contract on any date other than August 1 because of the possibility of our customers refusing to give us any work at a period of time when the unions might strike and cause these ships to

be strike bound in our shipyards?

A. Yes, the company said that.

Q. Did we not meet again on August 9, 1961, Mr. Alexander? A. I believe we did.

Q. And, at that time, did not the company propose a three year contract providing for five cent pension for the first year, four cents wages, four cents for health and welfare the third year, and to adopt the machinists' vacation plan? A. On August 9?

Q. Yes, Sir. A. Would you repeat that, please?

Q. Five cents for pension the first year, effective August 1,— A. —four cents for health and welfare—

Q. —four cents for wages and adopt the machinists' vacation plan. A. Yes.

Q. Do you recall your counteroffer—the unions' counteroffer on August 9, 1961, for an increase of five cents in wages, five cents pensions, plus four cents health and welfare on a two year contract and not incorporate the machinists' vacation proposal? A. We had one other thing, guaranteed holidays.

Trial Examiner: Are you satisfied with that answer?

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Mr. Cavano: Yes. Yes, I'm satisfied with it.

Trial Examiner: I wasn't sure it was clear.

Q. (By Mr. Cavano.) Is it not true, Mr. Alexander, that at about 11 o'clock at night on August 9, the company made an offer conditioned upon acceptance providing for five cents, five cents, five cents for a three year contract and to let the unions determine how these amounts were to be divided up with reference to pension, health and welfare or wages?

And did not the company ask the union to give us an answer by midnight that night? A. If I recall correctly, I think the company's proposal was nothing the first year, five cents the second year, and five cents the third year.

Q. Did not the company ask you to give it an answer by midnight that night? A. Yes.

Q. Did it not ask you to take it back to the membership for a vote? A. Yes.

Q. Isn't it true, Mr. Alexander, that after the company had made this proposal for five, five, and five, and asked for an answer by midnight, that the union made no counter-offer; did not set a date for another meeting, and refused to present the matter to a vote of its membership?

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A. Repeat again. I think the company's offer, if I remember correctly, was nothing the first year, five cents the second year, and five cents the third year.

The union rejected it and refused to take it back to the membership for consideration, because they had turned down a better deal than that previously.

Q. Did, Mr, Alexander, did the unions make a counter-offer on the night of August 9, 1961? A. At that particular time, I don't think we did.

Q. And was a date set for any other meeting? A. That was left to the Conciliator as to whether he thought a meeting should be set.

Q. And is it also true that the union refused to take the company's final proposal back to the membership for a vote? A. I said that we didn't consider it enough to take back to the membership.

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Q. (By Mr. Cavano.) Mr. Alexander, further meetings were had thereafter; were they not, at the call of the conciliator? A. Correct.

Q. And from that time forward a number of changes in the proposals were made by both sides; were they not? A. Yes.

Q. Until finally on or about September 1, the company made another proposal which the union presented to its membership, and the proposal of which is already in the evidence here.

Do you recall that? A. Yes.

Q. And that proposal was likewise rejected; was it not? A. Yes.

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Q. Mr. Alexander, this contract

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was signed by the parties on the 27th of October, 1961; was it not? A. Yes.

Q. Do you recall, Sir, having called me at my office on the morning of October 27th and saying to me, "Don't get excited, Charlie, but the local in Chicago has filed an unfair labor charge against the company on the unemployment question"?

Mr. Kossoff: Objection. It seems to me it is immaterial and irrelevant.

The Witness: I don't recall saying "Don't get excited" but I do recall calling you and telling you there was a—If I had—

Mr. Kossoff: There's an objection.

Trial Examiner: The objection is overruled.

Q. (By Mr. Cavano.) Did you say anything else, Sir? A. Yes.

Q. What else did you say? A. I said I hoped it didn't prevent the signing of the agreement.

Q. Can you tell me now how it came to your attention on October 27th that this unfair labor charge had been filed against the company? A. I don't remember, but I think Mr. Peterson or Mr. Grambo, one of the two, told me that they had filed the charges.

Q. Were these charges filed by the International, Sir?

A. No.

Q. They were filed by one of the locals affiliated with the International; is that correct? A. Yes.

Q. And that is Local 374; is it? A. Yes.

Q. Whose offices are at Hammond, Indiana? A. Yes.

Q. Mr. Alexander, did you at any time tell the company that you were—would not strike the yard after August 1, 1961? A. I told the company from the beginning of the negotiations that we had no intention of striking the company.

I told the company, and I told our committee that this was one negotiation that we were going to—I was going to do everything in my power to negotiate an agreement without a strike; that it hasn't been accomplished in years with this company and this was the time we were going to do it.

Q. Mr. Alexander, were you speaking for yourself or were you speaking for all of the members of your lodge? A. Was speaking for my International Union that I represented.

Q. Was there anything that you could have done to stop

any of these locals from calling a precipitous strike if they had wanted to have done so? A. I would have done every thing in my power. Whether I could have done so is debatable.

Q. In the absence of an agreement to extend the contract in writing after August 1, such a possibility existed at the—after August 1; did it not? A. A wildcat strike, not one sanctioned by the local union or the local lodges.

Q. Were there some other wildcat strikes just before these negotiations opened up; did they not, Mr. Alexander? A. I understand from time to time throughout the years there were wildcat strikes in the company's plants.

Q. Directing your attention to February of 1961, will you tell us what you know about the situation in Chicago when eighty-two men sat down and refused to work and were suspended for five days, and the entire yard was down for four days?

Do you have knowledge of that occurring in our Chicago yard in February of '61? A. I recall that Mr. Midnight called me on that.

Q. Do you have any knowledge of it, Sir? A. No firm knowledge of it, except which was told by Mr. Midnight and Mr. Lee Grambo and Mr. Dave Peterson.

Trial Examiner: Who are they?

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The Witness: The business manager and his assistant manager of Local 374.

Q (By Mr. Cavano.) Located where? A. Hammond, Indiana.

Q. The local union that processes grievances with the Chicago yard? A. Yes.

Q. And Mr. Alexander, who else did you say besides Mr. Midnight and Mr. Grambo?

Who was the other party that told you about it? A. Mr. Peterson and I discussed it.

Q. And who is Mr. Peterson? A. Business manager.

Q Of Local 374? A. Yes.

Q. The same local that negotiates grievances with the American Ship Building Company? A. Yes.

Q. Are the facts that I have just stated to you essentially correct? A. Not the way they gave it to me.

Q. What did they tell you? A. They told me there was a wildcat strike pulled over one of the problems—concerning one of the employees and that the company gave all the employees a five day

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suspension and they accepted the five day suspension.

Q. Did they tell you how many employees were suspended for five days? A. I think they told me fifty some odd.

Q. Do you know how many men were working in the Chicago yard at the time? A. No.

Q. Do you know how many men went to work the day after the suspension? A. No.

Q. Do you recall an incident in Buffalo in February of 1961 where there was another work stoppage on the part of the Buffalo local that lasted for five days? A. I don't recall a work stoppage in Buffalo lasting five days; no.

Q. Do you recall a work stoppage that lasted for three days? A. I recall a work stoppage occurring on the day that I arrived in there for a meeting with the membership that night, and I recall telling the officers of the union to be sure and put those people back to work the next day or I would not discuss the grievances with the company until they did.

And if I'm not mistaken, they were back at work the next day. I recall that.

Q. Mr. Alexander, isn't it true that the company penalized twelve or thirteen men for refusing to work overtime and by penalizing them five days commencing the following Monday that as a result of that on Monday following that penalty none of the employees of the Buffalo ship yard came to work and remained off work for two days; that at the end of that two day period all of the men returned to work except the fourteen who had been suspended? A. It was my understanding that they did not report to work that morning.

I arrived in there that day; I told the officers at the meeting that night and the employees, the members, that we would not process their grievances until such time as they went back to work and the next day I understand they went back to work.

Q. Mr. Alexander, the incident in February of '61 in Buffalo and the incident in Chicago in 1961 just prior to the opening of the negotiations of our contract in June of '61, what is your opinion as to whether or not that created an area of friendliness and co-operation in an attempt to reach an applicable agreement between the parties? A. I don't know that that had any bearing. These companies had a long history of wildcat strikes because of

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the treatment of the employees over a period of years from what I have been told.

Q. Mr. Alexander, have you also been told how—of a long history of strikes on the part of the membership when they were unable to reach an agreement on a contract? A. Yes, I it happened every time there was negotiations That's why I was determined it wouldn't happen this time.

Q. Mr. Alexander, did the company at any time tell you that it had a contract that it could work upon as soon as the labor contract was executed between the parties? A. I think all during the negotiations the company told us that they were afraid to take any contracts because they didn't know whether they would be able to do the work or not.

And we told them that we had no intentions of striking. Whether they had contracts at the time of the strike, I don't know.

Q. Didn't the company say that they were bidding on any jobs and that they were far into the future and they didn't know when they would start? A. The company said they were bidding on jobs.

Q. Didn't the company tell you that they had no work in the future beyond the time that our contract expired? A. The company said they had no immediate jobs to start; yes.

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Q. The company did not say therefore that it was going to find it necessary to reject any offers of work that might be presented to it; did it? A. I don't understand the question.

Q. Did you ever hear Mr. Midnight say that the company was going to have to reject any possibility of work if a contract wasn't reached by the 1st of August? A. Mr. Midnight said that he wasn't going to bid on any jobs because he didn't know whether he would be able to do them or not.

Yes, he said that during the month of July.

Q. He said he would not be able to bid on any jobs? A. Yes, he said in the month of July, he said in the month of August we were turning work away.

We could have work in the yards if the company would put the work in our yards.

Q. What else did he say, Mr. Alexander, in that connection, anything else? A. Not that I recall.

Q. He said they were bidding on jobs, and they couldn't do anything about them until they received the—settled the contract.

During our negotiations Mr. Midnight said he was not bidding on any work because he didn't know whether he could do it or not until the contract was settled.

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You are sure those are essentially the words he used? A. I'm sure they are. He said every meeting they had they were turning work away, named certain jobs that the companies wanted to put the jobs in the yards but they wouldn't put them in because they didn't know whether the job could be done or not.

Q. Mr. Alexander, did he state that at every meeting? A. Not every one, but he said it on every occasion.

Q. About how many meetings would you say he made that kind of statement? A. These for—At least four or five.

Q. Any more that that? A. At least that many, and he named names of some ships and some companies.

Q. What names did he name? A. I don't recall the names.

Q. What companies did he mention? A. I don't recall the names of the companies.

Mr. Cavano: No other questions.

Trial Examiner: I'll have to read this record, you know; but it seems to me that in this last exchange of questions and answers, that appeared to me at least to be some variances in your testimony.

You stated, as I recall, at one time, that Mr. Midnight said that he would not bid on a job because he

didn't know what conditions were going to be and then again you seemed to say that other companies would not put work in the yard because—

The Witness: Shipping owners.

Trial Examiner: Owners, yes, would not put work in the yard.

We've got two situations, two kinds of cases.

The Witness: That's what the company told us, that there was both kinds of cases.

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CHARLES E. ALEXANDER, JR.:

Redirect Examination.

Q. (By Mr. Kossoff.) Mr. Alexander, under the union

constitution, that is the Boilermakers' Union constitution, could the locals go out on strike without executive council approval?

Trial Examiner: You mean constitutionally?

Mr. Kossoff: Constitutionally, is that correct? A. The unions can go out on strike without the executive council's approval, but they can't receive strike sanction without the International's approval nor can they receive strike benefits without the International's approval.

Q. In other words, any strike without— A. It would be a wildcat strike.

Q. That is correct. And had the executive council have authorized a strike? A. The executive council was not asked to, at no time.

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Q. Now, your familiarity with this alleged—what has been identified as a wildcat in South Chicago in February of '61 is merely what you have heard; is that right? A. I was not present. I don't know all of the circumstances.

Q. Do you know of your own knowledge whether or not the grievances reached the arbitration level relative to the discipline of these people? A. No, I don't know.

Q. Do you know of your own knowledge whether or not a grievance reached the arbitration level relative to the discipline in the Buffalo situation? A. I understand that an arbitrator has been selected, but it hasn't gone to arbitration as yet.

Q. So that what the company has identified as a wildcater is as yet to be arbitrated; and an arbitrator has been selected in Buffalo; is that correct? A. I understand one has been.

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Mr. Kossoff: We would like to recall Alexander Dalrymple very briefly.

Trial Examiner: You have been sworn, sit down.

ALEXANDER DALRYMPLE was called as a witness on behalf of the general counsel, and having been previously duly sworn, was examined and further testified as follows:

Redirect Examination.

Q. (By Mr. Kossoff.) One question Mr. Dalrymple, almost immediately after the contract was signed on October 27th, you called three—thirty-three people back to the Chicago yard; is that correct? A. It figured pretty close.

Mr. Kossoff: That's it. Thank you.

The Witness: That includes—I think if you look at my sheet you will get exact figures. We didn't make

it out for what we call production men. Look at the sheet for November 1.

The November 1 sheet will give you that, who they all were.

Q. But it was approximately thirty-three? A. Yes, everyone in the yard.

Q. That were recalled? A. Were recalled.

Mr. Kossoff: No further questions.

ALEXANDER DALRYMPLE:

Recross Examination.

Q. (By Mr. Cavano.) Mr. Dalrymple, how many of those thirty-three were hourly rated employees in the bargaining unit? A. If I remember off-hand, I think I had about eighteen iron workers; no more.

Q. And what were they recalled for? A. Just in case of emergency jobs showing up, emergency repairs.

Q. When is the busy season for the company in Chicago? A. Well, normally it starts sometime in November.

Q. Did you receive any work in November, Mr. Dalrymple? A. Very little, unless toward the end it opened up a little before—

Q. Toward the end of November? A. Yes.

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Q. When you recalled these men in the bargaining unit the early part of November, were they hired for the purpose of preparing them for the winter season? A. No, for any calls I would get. Could I explain that a little further?

I mean, if you want to work you have got to give some service irrespective of what it costs. You must keep some men around you. Otherwise when it comes to big jobs in the winter year, you're out of luck.

Q. And that's what you did this year. You recalled these men because the winter season was starting? A. The men were held for the same purpose.

Mr. Cavano: No other questions.

ALEXANDER DALRYMPLE:

Redirect Examination.

Q (By Mr. Mamet.) Now, the prior year, prior to 1961, 1960, you held people over the summer months; did you not? A. Yes. We had a little more work.

Q. And in addition to working on emergency repairs which might come in over the summer, it was customary to do maintenance work in your own yards; wasn't it? A. As much as we would need, enough maintenance to keep the fellows busy; yes.

Q. Now, prior to the lay-off when the—When you said iron workers you meant boilermakers? A. Yes.

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Q. Prior to the lay-off in August of 1961 the people were working on maintenance work; were they not? A. You could say it was maintenance work; yes. I can't make eight jobs.

Q. But this is what you do every summer? A. Not to the extent I did this year; no, because we would have a little maintenance work of some kind. This may be a bad year.

Q. Now, when the people were recalled after this lay-off, when they were recalled after the extension of the contract, they went back to the maintenance work; is that right. A. Well, work we dug up, maintenance jobs.

Q. But again you assigned them the maintenance work; is that right? A. Of a kind; yes.

Q. And while the union people were laid off, the foremen were doing maintenance work in August of '61; is that right? A. Well, I wouldn't call it maintenance. They were doing odd jobs to keep themselves busy.

Q. Well, what would be an odd job? A. For instance, they started painting their own offices or jobs like that.

If a pipe would burst they would fix it.

Q. Did they work on the docks at all?

A. No, not to any great extent.

Q. But they did work on the docks? A. If a leakage would show where there were some—

Q. What else did the foremen do during this period of time? A. Painting a dried out gate which was painted last year, too.

Q. Did they work on air supply lines? A. Oh, I don't mean big projects?

Q. No, I understand. A. Just a leaking pipe or something like that.

Q. Did they work on water supply lines? A. If they broke, yes; one of them, I believe, was in the blacksmith's shop.

Q. And they worked on the electric power lines? A. Maintenance, anything that would—A light would go out, bulbs to change.

Q. And they also worked on machinery; did they not? A. Cleaning up of machinery.

Q. But that's what we call maintenance work; isn't it? A. We only had one man in the machineshop, if you put it that way; one man in the electrical shop; and at one period we only had three or four men there.

The other switch were on vacation, so you can conjecture from that how much maintenance they were doing.

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Q. Were you around in the 1958 strike; weren't you? A. Yes.

Q. Now, do you know the date that the South Chicago yard struck? A. All I can do is make a guess. I know it was about fourteen days after the Toledo—the Toledo date. Could get it out of my notes.

Q. The Toledo date was after the 1st of August, of course? A. Yes.

Q. And fourteen days after the Toledo ship yard struck, the Chicago yard struck; is that right? A. That is right; yes.

Q. But Chicago stayed in for another fourteen days before—after Toledo? A. That is right.

Q. And you know why they stayed in; don't you? A. Well, the fact was they had no authorization from the International to strike.

Q. And they didn't strike without authorization then, is that right? A. No, they didn't get that authorization.

Q. When they finally got the authorization, to your knowledge, they then struck; right? A. They struck right away; yes.

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ALEXANDER DALRYMPLE:

Recross Examination.

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Q. And after July, 1961, when was the next time that you had a ship in the drydock for repairs? A. On the drydock? Late November or early December.

Q. Of 1961? A. Yes. That was the beginning of the winter work.

Q. And did you have any other jobs other than drydocking after October 27, 1961? A. No drydockings; no. But after the fellows were laid off, I had two calls from different steamship companies for small jobs.

I brought my men and did them. That was in October.

Q. That was in October? A. Yes, small jobs; yes.

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ALEXANDER DALRYMPLE:

Redirect Examination.

Q. (By Mr. Mamet.) Now, I just want you to explain these new exhibits that just went in on behalf of the respondent.

Just explain what the non-productive column means? A. Well, it could be repair maintenance, cleaning up, any miscellaneous job for which we pay the full wages for with no income from that type of work.

Q. This would be done by the union people; is that right? A. Oh, yes, yes.

Q. The people in the bargaining unit, that's what I mean. A. Yes.

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Q. Now, normally this is the kind of work, except for emergency work, done over the summer in order to service your big accounts that come in in the winter; is that right? A. Yes, whenever it comes up. More or less or keep the men occupied and hold them in the yard.

We foot the bill.

Q. So that you will have them for the winter? A. No, so we will have them if an emergency call comes in.

Q. I see. Now, tell me then, during the average summer, the company loses money? A. Yes. Some we lose; some—

(Discussion off the record.)

Q. (By Mr. Mamet.) Now, this is done not only in the—for good will but for business because if you don't service them in the summer, you don't get them in the winter? A. We don't get them in the winter, so we service them all summer.

Mr. Mamet: No further questions.

ALEXANDER DALRYMPLE:

Recross Examination.

Q. (By Mr. Cavano.) Just one more question. Did you have work in the Chicago shipyard and ships in the dry-docks in the summer of 1960?

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A. Yes, we had a little bit better in '60 than we had in '61. The conditions were bad then, too.

Q. And did you have any in the yard in 1959 during the summer? A. '59, if I recall, was a good year, because we were doing prefabricating for the coming winter.

Q. So that you had work going in the summer of those two years? A. In fact, towards the last, end of the summer in those years, I had two shifts running.

Q. But you didn't have any in the summer of '61? A. '61 was dead.

Trial Examiner: There will probably be some more testimony from the company. Maybe there will; maybe there won't.

But for my information, just as sort of a test boring here, taking the July 31 exhibit, Monday July 31, looking on the second page, it says in "the yard Steamer Carmi Thompson, regular hours, 143."

Isn't that a regular vessel in the yards?

The Witness: She finished on June 26th. Then they asked us to store the vessel until she got an assignment.

She was getting an assignment in August.

Trial Examiner: All right. I'm just grabbing them at random.

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Mr. Cavano: I think that's the only one, Mr. Bott. Weren't there just a couple of our on that one at that time?

Does that labor report show four hours or something on that Carmi Thompson?

Trial Examiner: No, it was 143, something like that. I have no other questions.

You may step down. Thank you.

Mr. Kossoff: One question.

ALEXANDER DALRYMPLE:

Redirect Examination.

Q. (By Mr. Kossoff.) Now, you don't mean, Mr. Dalrymple, that the whole summer of 1961 you didn't have one ship in your yards; did you? A. I stated I had a ship in the dock on July 19th.

Q. Other than the Zanzibar, you don't mean that you had no other ships other than the Zanzibar; do you? A. No, we had ships before that.

Q. And in the summer also; wasn't it? A. July was the last one.

Q. On July 8, 1961, did you not work on the Steamer Alton Hoyt II for three days? A. It could be; yes.

Q. And on June 7, 1961, did you not work on the Steamer Carmi Thompson for nineteen days? A. That's right. That's every summer. It's all summer.

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Trial Examiner: Any other questions?

Mr. Kossoff: Perhaps I have something else. Nothing further.

Trial Examiner: Do you have any other testimony?

Mr. Kossoff: Nothing further. We rest our case.

Trial Examiner: The charging party?

Mr. Mamet: Nothing.

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GORDON STAFFORD was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (By Mr. Cavano.) Where do you live, Mr. Stafford? A. 20328 Park Lane, Rocky River, Ohio.

Q. And are you affiliated with the American Shipbuilding Company? A. Yes.

Q. For how many years have you been with that company? A. Oh, somewhere over 23.

Q. And what is your present title? A. Manager of repair sales.

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Q. Directing your attention to about August 31, 1961, did the company receive a request for a quotation for the Government? A. Yes.

Q. And this was for some repair work, was it? A. You haven't named the ship, I mean—

Q. The U. S. S. Prescott? A. The U. S. Prescott, yes.

Q. Are you familiar with the circumstances surrounding the Prescott? A. Yes. I handled the whole thing, as far as that

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goes.

Q. Directing your attention to on or about August 31, 1961. will you tell us what if any negotiations you carried on with the Navy with reference to the Prescott? A. Well, they—well, as I recall there was three different people that called me. I don't remember their names although it is in the affidavit. At which time they wanted to put the Prescott on the dock in Buffalo, New York. And they also sent their standard Navy form through. I shouldn't say standard. They've got all different kinds of them, but anyways, their form. At which time as I recall we started preparing a statement from this original document they sent us. And in the interval one of these fellows called me again and in

talking with them I'm not sure now whether there was that time or the first time, but one of these times anyway I did mention to him that we were in labor negotiations and that we felt obligated more or less to let them know, and that if we wanted to come ahead and put the ship on the dock okay, but as I say I don't know where that conversation fit in there.

Q. What answer did you get when you made that statement? A. They said, well, they didn't feel they wanted to put this boat in the yard if it was still in labor negotiations. Afterwards—he called again and he talked to me

in regard to a wheel, a propeller. And the wheel had to be statically and dynamically balanced. Well, we had no equipment to dynamically balance a wheel blade, so I told him this. So he mentioned to me then, well, maybe they would have to have this accomplished somewhere else, meaning this balancing. I told him, well, that would be fine. He mentioned—I know—where the wheel was coming from and so forth. And with that that's about where it ended. I didn't call him back again, assuming if he did get the blade balanced somewhere, well, they'd probably call again. But anyways, that's about where it ended.

Q. Do I take it then that you were willing to accept this drydocking if it had been offered to you but it was not given to you because of your labor situation? A. Well, I really don't know whether it was the labor situation or this balancing of the wheel. I told them originally that we would put the vessel on the dock.

Q. Well, directing your attention to the latter part of July or the early part of August of 1961, did you receive a call with reference to some business from the Corps of Engineers pertaining to the Markham? A. Yes.

Q. Will you tell us about that?

Mr. Mamet: I'm sorry. Just give me that date again? I missed that date.

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Mr. Cavano: The latter part of July or the early part of August, 1961.

Mr. Mamet: Thank you.

A. I don't remember again which person called at the time because this all was accomplished or these jobs were all finished prior to finding out we were going to get any problems. I really don't know. But any way, at that time they wanted to put this vessel in Toledo and from what little bit I knew of the thing the gates were leaking on the bottom of the dredge somewhere where they wanted to seal them up again. And I told him the same I had mentioned before, that the dock was available but that we were having labor negotiations and that if they wanted to come ahead, okay. And they in turn said the same, they thought they'd wait and see what the situation might be or go somewhere else.

Q. Did you get the job? A. No sir.

Q. Do you know who did get the job? A. Well, in tracing the job through I understood the vessel had went to Manitowoc Shipbuilding and they tried to put it on their floating dock, drydock. I don't know whether they really put it on. But anyway they couldn't dock there because it was too heavy. And I heard later on that it ended up at Frazer-Nelson in Superior-Duluth, Wisconsin.

Q Are you able to estimate what the amount of this

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job would have been? A. No.

Q. On the Markham? A. No.

Q. How would you be able to estimate the amount that the job would be worth? A. Well, I mean, it was all under the water. You had to put the vessel on drydock, look it over. Normally what happened there, if it went to Toledo, they'd look it over and give them a price for the work.

Q. In other words, until the Markham was actually docked and the water taken out of the drydock and you had a chance to examine it, you couldn't estimate the amount of the repairs or the value of the contract, could you? A. That's right.

Q. Did you have any conversations, Mr. Stafford, with reference to any other ship owners who had work that they wanted to give to us during the period of July and August that refused to give us business because of our labor situation? A. Oh, I had some talk with the Hutchinson people, which is a liner steamship, I believe.

Q. And who is Hutchinson? A. They're the Pioneer owners. At which time their vessel, the Pioneer Challenger had got in trouble up around

Buffalo.

Q. Can you place the time of year, the date? A. I don't really remember exactly what time.

Q. Well, do you know whether it was July or August of '61? A. I guess it was early in August I would say.

Q. Very well. A. Somewhere in that neighborhood. At which time they talked with me and asked about the availability of the Lorraine drydock. I told them at that time that we thought we could handle them at Lorraine and so forth and I told them against—as I say, I told them also that we were having labor negotiations and that if they wanted to proceed ahead, why, fine and dandy. And at that

time the vessel—well, I don't remember just what—where she was, but any, the owners finally told me, well, they were going on up to Frazer-Nelson.

Q. Did they give you a reason why they were going to Frazer-Nelson? A. Well, they just said they didn't want to take a chance on putting the vessel in our drydocks and possibly have some sort of labor disturbance.

Q. Do you know whether or not the work was done at Frazer-Nelson to this ship? A. Yes, it was.

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Q. Are you able to determine the amount of that repair work? A. The figure that I heard was somewhere in the neighborhood of $17.000.

Q. Were there any other incidents during the months of July and August of '61 that came to your attention of other ship owners that had similar situations? A. Well, there was the one other vessel was the Ishpoming which is owned by Cleveland Cliffs, at which time as I recall the vessel was brought from Ashtabula, Ohio to the Lorrain yard, at which time they said they would like to put the ship on the dock, but they said they would like to wait until we got through with the labor negotiations. And as far as I know that's what happened.

Q. Was the repair work ever done on the Steamer Ishpoming? A. Not to my knowledge.

Q. Were there any other incidents during July and August that you recall? A. No, I don't recall of any others.

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GORDON STAFFORD:

Cross-Examination.

Q. (By Mr. Mamet.) Now, in these four instances that you described, Mr. Stafford, you volunteered to inform the

ship owners that you had a "labor dispute?" A. That is right.

Q. Now, are you pretty friendly with the Pioneer people? A. Well, I'm fairly friendly with I would say all of our ship operators. I mean, there's only 15 or 20 of them, I guess, on the lakes here that we do business with. What I'm saying is, in order to do my job I have to have a personal contact with them, probably the closer the better.

Q. And who is C. L. Hutchinson? A. Well, Charlie Hutchinson, as far as I know, is—I really don't know what his title is.

Q. And he's with Pioneer, isn't he? A. That is right.

Q. Isn't it true, Mr. Stafford, that after this case was filed with the Labor Board you asked Charlie Hutchinson to write a letter saying that they wouldn't give you work because of the labor dispute? A. No. I asked at the time —what actually took place was

that—this was already past history at the time that we got involved with this, but Mr. Cavano came through my office and said, "Do you think you can get letters from these two owners," meaning the Cleveland Cliffs people and the Hutchinson—of what took place at this particular time. I said, well, I thought I could, which, as I say, I knew. At which time I called them up and I talked with them and we had a little discussion as to, well, do you want the date of it, you know, and this conversation was over.

Q. When did you call them? A. Cripe, I don't know.

Q. On or about November 20, is that right? A. It could have been there. It was quite a while after the incident, as far as I know.

Q. And after the charges were made and— A. Yes. Actually I didn't know about it until after he asked me to get these letters.

Q. And then what did you do, you talked to Mr. Hutchinson? A. Yes.

Q. And you said, "Charlie, I want you to give me a letter"? A. Right.

Q. And did you tell him what they put in the letter? A. No.

Q. How did he know what to put in the letter if you didn't tell him?

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A. I mean, he was to write up what took place as far as our conversation of whether the vessel would go on the dock. And as I said, I told him we were in labor negotiations at the time and he said, well, he doesn't want to take the chance, and he put it on through—

Q. We know what happened. I just want to know about your conversation on the 20th. Tell us what you told Mr. Hutchinson on the 20th? A. I asked him if he would give us a letter on the conversation that took place at the time of this accident and why he was going somewhere else instead of us.

Q. You turned down the business because of the labor dispute, is that right? A. No. Really, I didn't turn any business down. He told me.

Q. But you scared him out of giving it to you? A. No. I felt obligated to tell the fellow that we were in labor negotiations. I think that's a good assumption.

Q. And this was the reason that he didn't give the ship to you? A. No. I didn't say that was the reason. We'd

have liked to have had the ship. We could have used it. I—after all my job is to try and get the darn work.

Q. You told him, though, that what, there was a possibility of a strike? A. No. All I mentioned to him was as far as I can recollect is that we were having labor negotiations.

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Q. Is this so unusual to have labor negotiations? A. Well, I could say that, that I think that most of them probably already knew at August first that we were in labor negotiations. What I mean by this is that all the people; knew.

Q. Charlie Hutchinson knew you were in negotiations? A. He may have. Like I say, I mean, I merely as I said told him that we were in labor negotiations. I felt it my duty to tell him that we were in labor negotiations and it was up to them. I mean, after all, it had happened once before.

Q. What else did you say to him? Did you say—you didn't mention strike? A. No, no.

Q. You didn't mention lockout? A. No.

Q. You didn't mention layoff? A. No.

Q. And all you said is, "We're in labor negotiations, it's up to you, Charlie," is that right? A. Yes. I said, "We are in negotiations," or whatever it was. I can't remember the exact language. There's too damn much time elapsed since then.

Mr. Mamet: I want to identify an exhibit number.

Trial Examiner: All right.

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Mr. Kossoff: It will be our exhibit. Can I answer up to identify this exhibit?

Trial Examiner: You want to make it a General Counsel's exhibit?

Mr. Kossoff: Yes. I would like it to be a General Counsel's exhibit. Would the reporter please mark this document General Counsel's Exhibit Number 7.

(The documents above referred to were marked General Counsel's Exhibit 7 for identification.)

Q. (By Mr. Mamet.) Now, that was the conversation and then sometime in November you called them and you asked for a letter? A. Yes.

Q. And he wrote that letter? A. Yes.

Q. And you told him to backdate it, didn't you? A. Well—

Q. Did you tell him to backdate it, yes or no? A. Yes.

Q. And the letter was not dated November 20 but it was dated July 20, wasn't it? A. Whatever it was.

Q. But it was mailed in November, wasn't it? A. That's correct.

Q. And forwarded on without any information that it had

been backdated, isn't that right? A. That's quite possible, yes.

Q. I'll show you General Counsel's Exhibit Seven for identification and ask you whether or not that's the letter we're talking about? A. Yes, it is.

Q. Now despite the fact that you know him by Charlie, that's what you call him, isn't it? A. Yes.

Q. And he wrote you that "Dear Sir," is that right? A. Right.

Q. And that letter was prepared for the purpose of this case, wasn't it? A. That is correct.

Q. Now, tell us the situation about the Cleveland Cliffs Iron Company? A. Well, in the case of the Ishpoming, as I recall, I believe Mr. Rappert had some discussion with Mr. Midnight in regard to this Ishpoming, at which time we talked about bringing her up to—putting her on the dock in Lorraine and I was asked to get this letter from Mr. Rappert.

Q. Now, you talked to Rappert on or about November 29; isn't that right? A. It was right about the same time at that.

Q. And you also asked a man from Cleveland Cliffs to backdate the letter?

A. That is right.

Q. Now, do you recall your conversation with the man from the Cleveland Cliffs relative to the steamer Ishpoming back in August? Do you recall that conversation? A. Well, as I mentioned before, I got in on this Ishpoming when—Mr. Midnight got in on a portion of that. In other words, Mr. Rappert—

Q. You didn't talk to Mr. Rappert about it? A. Yes, I did to some gentleman. I talked to Mr. Rappert in regards to getting this letter after the ship had come up to the Lorraine yard, and like I said, Mr.—

Q. Let me see if I understand this, Mr. Stafford. You didn't talk to Mr. Rappert in August about the Ishpoming

now, did you? A. I did to some extent. I mean, I called him to get the letter. I mean, Mr. Rappert—

Q. When did you call to get this letter? A. Back in—

Q. On November 29, isn't that right? A. November 29, yes.

Q. Or thereabouts, in November? A. What are—that's right.

Q. I'm probably a little inarticulate. Let me try again. You didn't talk to Mr. Rappert in August relative to the steamer Ishpoming, did you?

A. I really don't know what the date was. I mean—

Q. The only time you talked to Rappert relative to the steamer Ishpoming was when you asked him to send the letter? A. I believe that's right. I mean, as I say, this stuff's talked all the way through.

Q. And that was sometime in November, is that right? A. Yes, it was sometime around the time of this other letter.

Q. Then you would have no knowledge as to why sometime in August the steamer Ishpoming didn't come into the American Shipbuilding Company of your own knowledge? A. Not my own. I had some conversation.

Mr. Cavano: Would the reporter mark this General Counsel's Exhibit Number Eight for identification?

(The document above referred to was marked General Counsel's Exhibit Number Eight for identification.)

Q. (By Mr. Mamet.) I show you General Counsel's Exhibit Number Eight for identification. Is that the letter you

are talking about; that you requested sometime in November that they send to you and date back in August? A. Yes.

Q. That's the letter? A. Yes.

Q. And this letter, too, like the Pioneer letter, was for-

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warded without any identification made that it was written out in August, but in November, is that right? A. That's right.

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Q. All right. Now, calling your attention to these Navy jobs, is it your testimony here that the Navy wouldn't give you the work because of a labor dispute? A. No. I really didn't know whether it was a labor dispute as I said before or whether it was this balancing this wheel. But they did mention—when I did mention the labor negotiations they had mentioned that, well, they felt they wouldn't you know, come up to the yard or they'd better wait and see how we make out. I forget the actual conversation.

Q. Let's see, if we can help you remember. There were two parts to the Navy problem, is that right? A. Yes.

Q. Now, one part involved a propeller? A. Right.

Q. Is that right? A. Right.

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Q. And you could not physically do that work? A. We could do the one but not the—dianamically balance. As far as what little I know about it, as far as I know, we don't dianomically balance any of the propellers up here. They do them on the coast. But I understand you need some special machinery or something.

Q. What was the other part of the job? A. Well, the other part was—he forgot what the heck it was now—something for under water anyway. It was either the main retail shaft or something like that. I forget what the—what it really was. But anyway, they wanted to come on dock to do the work.

Q. Well, they had to as a matter of fact, isn't that right? A. Yes, that's what I understood.

Q. In fact, you were the only employees on the Great Lakes where this work could be done—only place; isn't that true? A. I don't know that. They could have went to Manitowoc or Frazier-Neilson. I've got—I don't know even how large that vessel is, whether this fellow up in Sturgeon Bay could dock it. It was somewhere around the Buffalo area in—anyway at the time.

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Q. Well, is that Lake Erie up there? A. I'm not too sure whether this thing was in Lake Erie or not. It could have been down in Ontario. I really don't know where the ship was.

Q. If it was in Lake Erie, your docks would be the only ones that could accommodate this ship; isn't that right, in Lake Erie? A. Yes.

Q. Isn't it true that the Navy said to you, we don't care about your labor dispute or whatever you're telling us and forget the propeller but when—but we need this work at that time and you refused it? A. No, sir. They never said that to me.

Q. But they did say it to somebody in your company; isn't that right? A. I don't know.

Q. Who is Mr. Williams? A. He's our vice-president of sales.

Q. Williams told you that he told them that we are not taking the work; isn't that right? A. No, sir. I didn't even know that Williams was in on this until you mentioned it now.

Q. Then who might the Navy have talked with other than you? A. They could have talked with Mr. Savage, Mr. Conlin, and I guess Mr. Williams.

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Q. Who is your immediate superior? A. Mr. Williams.

Q. And who does Williams—Strike that. How does Williams fit into the structure? A. Well, he handles mostly new work and a lot of outside work, any outside work we do get like—It's pretty hard to split the line right there. I mean they handle some of the large covering work.

Q. Mr. Louis from the Department of the Navy called you on September 7; is that right? A. If it was Mr. Louis. I didn't really know who it was.

Q. Somebody called you? A. Right.

Q. On or about the 7th day of September and requested a quotation from you on the work on the Prescott? A. Right.

Q. You refused to quote? A. No, we worked up a statement and everything. We had it ready.

Q. But you never sent it to them? A. No, sir.

Q. And you never gave them a statement or quotation? A. Right.

Q. And you told them it was too difficult; is that right? A. I had mentioned we had these labor negotiations and this

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other was this doggone wheel. Personally I assumed he evidently was getting this wheel done somewhere else because I didn't call back, as I mentioned.

Q. At any time did you tell this man from the Navy that you were not taking any new work? A. No, sir.

Q. You just told him that you were having labor negotiations? A. That is right.

Q. And what did you—did he say to you? A. He mentioned to me that—first as I recall—

Q. Now just excuse me for a minute. Listen to the question now. You said you were having bad—having labor negotiations? A. Right.

Q. Now, can you remember his immediate reply to that? Did he say bully, or that's terrible? A. Oh, no.

Q. What did he say? A. He said something to the effect, well, we are getting this wheel shipped up or some darn thing as I remember and he'd wait and see what situation was or some words to that effect as I recall.

Q. And that was the end of the conversation? A. Basically, yes.

Q. When did you talk to this man from the Navy again? A. I guess it was sometime in September probably. I really

don't recall the exact date. I mean it was something like that.

Q. The first time you talked to him did he have the problem with the propeller? A. I think that's what—They forgot something in the original bid or whatever it was they sent, their form, and they were sending this addendum. And he called me to let me know it was the addendum which had this propeller problem in it which we talked about.

Q. Then later on he sent this addendum; is that right? A. Yes.

Q. And he called you; is that right? A. Right.

Q. And when did you say to him then—what did you say then? A. I told him we couldn't dinamically balance this propeller.

Q. Then he finally said don't worry about the propeller, take the job anyway? A. No.

Q. What did he say, forget the propeller? A. No, I never heard from the—from him again anyway.

Q. That was the last time you had any conversation with Mr. Louis? That's your testimony under oath? A. Right.

Q. And you also told him that if the ship was brought in

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there would be a strike? A. No.

Q. And you never told him if the ship was brought in—the men would walk off the job? A. No, sir.

Q. And you never told him that you were not going to accept new work; is that right? A. That is right.

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A. They told me at the time that if these people were not available at the yards that if a job came along we should at that time take it, and we should get the people to do the work. That was it. That was the understanding that we had from him.

Q Midnight told you that? A. Yes, sir.

Q. Said if the job was worth— A. No.

Q. A big job? A. No. I probably misstated it. Any job that came along.

Q. Any job at—take it, we'll get the people in. A. Yes, I understood that.

Q. And you were carrying out these instructions by telling these people you were in labor negotiations in that—that was the way to get the job?

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CHARLES CAVANO, a witness called by and on behalf of the Counsel for respondents, being first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (By Mr. Midnight.) Mr. Cavano, would you give us your full name? A. My name is Charles Cavano, C-A-V-A-N-O.

I reside at 17743 Edgewater Drive, Lakewood, Ohio. I

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am an attorney at law. I have been affiliated with the American Shipbuilding Company since 1951.

I am a part-time salaried employee of the company in charge of its workmen, and unemployment compensation matters at all of the company's shipyards.

In addition to the part-time salary position I was retained by the American Shipbuilding Company in January of 1961 to represent it as its counsel in labor relations, as its rate labor relations manager in connection with the negotiations with a group of eight unions with whom the company had one contract, and with the machinists union with whom the company had a separate contract.

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The Witness: The first meeting between the company and the eight unions took place on June the sixth, 1961 at 2:00 in the afternoon at the Sheridan-Cleveland hotel. At this meeting a general discussion took place of the recommendations for changes that the employer had previously mailed to the union, and in addition at this meeting the union submitted additional changes in the contract that it wished to discuss. We then agreed upon several minor changes. As we agreed that several of the terms of the original agreement were to be continued in the new agreement without change.

Such as, for example, use of the bulletin board. Very

minor matters.

During the course of the meeting on June 6, 1961 Mr. Midnight addressed the group and explained the condition of the shipbuilding industry, and also explained the condition of the Great Lakes shipbuilders, and the customers from whom the shipbuilders obtain their business. He also stated from information he had gathered that the principal competition of the American Shipbuilding Company were paying wages much lower than those of the American Shipbuilding Company, and in one case as much as 42 cents an hour less.

He stated that it was important that in our negotiations here that the union keep us in mind, and he suggested at his first meeting on June 6, 1961, that it would be feasible for the group of eight unions to consider keeping the wages the same as they were in the 1958 agreement.

Either until our competitors wages came up to ours, and that whenever they did come up to ours, and they were equal that we would then be willing to re-open the contract for the purpose of discussing wages.

The Union stated that they were desirous of effecting an early settlement in this matter too, and it was their hope and desire that we would be able to enter into a mutually accepted agreement between the parties.

On June the seventh we had another meeting at the Sheridan-Cleveland Hotel at which time some further changes

in the contract were discussed, and this meeting lasted from nine to 12:30, and two to 4:30 in the afternoon.

On the eighth of June, 1961, we discussed other changes in the contract having to do with seniority, protections of the union, and items of that kind, and this meeting was from nine to about a quarter of one, and from two in the afternoon until about 6:30 in the afternoon.

Generally these conversations had to do with recognition and checked off positions, and seniority, and other changes in the agreement.

My notes show that the next meeting took place on June 20th in the morning at the Sheridan-Cleveland Hotel at 9:00 in the morning, and we met until twelve, and we started again at two and, I believe, we suspended at about 3:30.

At this time the union talked about electrical workers, and pipe fitters union who were part of the group of eight that they had some proposals, and Mr. Alexander, who was the chairman of the bargaining committee for all eight unions, stated that we—he thought the electrical workers and pipe fitters proposal would be taken up at a later date, and from time to time their proposals along with the boiler makers would be discussed.

In the afternoon session of June 20th Mr. A. L. Young, I know him as Lonny, maybe his initials are not correct, Lonny Young came to the meeting at the Sheridan-Cleveland Hotel from

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Washington, and what we understood was the supervisor of Mr. Alexander, the chairman of the negotiation committee, and at this time he made a speech in which he said, it was not his intent to impede in the negotiations in any way. He said that the facilities of the Washington office were available to the Union. He said, he told the other unions with whom we were bargaining that he would not intrude upon them, but that he was glad to be of any assistance that he could. He said that he was aware of the condition of the shipbuilding industry, and he said it is sickening.

He said that there is a wide difference within the industry within the various parts of the country too. He said, that it appeared to him that there would be nothing accomplished in Congress this year to assist shipbuilding companies—rather shipowner companies—to obtain subsidies in order to make it possible for them to compete with Canadian and foreign shipbuilders.

He said, that the Shipbuilders Association, which is an employer group and he were working together for a common goal. He said that the ten year replacement program does not look good as far as the shipbuilders are concerned, and he said he hoped that they might get some legislative idea as to some relief, so that shipowners and shipbuilders would be able to get some more business.

He said, I am sure you have had your differences, but

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we have common goals, and they are inseparable, and he said, we must provide the industry, and he said, that our primary responsibility is to do the best that we can for our employees and at the same time for management.

Following Mr. Young's speech, he proceeded to continue our negotiations, and at this point Mr. Alexander stated,

that he did not have a package to present to the company at this time, but he said that he did wish to withdraw the Union's request for a 35 hour week.

He said, that there were some wage questions, he said in the form of fringes, that he thought ought to be discussed, and he enumerated these as holidays, vacations, guaranteed holidays, pensions, the shift premiums.

He said, they all involve money, and Mr. Alexander said, that is what the company is concerned with.

He said there are other money items that are not money problems as much as these are. He then talked about the excessively dirty working provision in our agreement and he said, this was another problem that we have to explore.

He asked whether we should pinpoint these in some way. He said, that they (sic.) excessively dirty work provision which is a part of practically every contract of shipbuilders, that there was a problem with all of them including our shipyard. He said, whether it would involve more money or not depends

on what the company came up with with reference to the dirty work provision.

He said, that he felt that we needed uniformity, and understanding as to what the language of the contract meant.

He said, that there were different interpretations placed upon the contract language by each of the four shipyards, which are incidentally located in four different cities. One of these shipyards is in Laredo, Ohio. One is in Toledo, Ohio; one is in Buffalo, New York, and the other is in Chicago, Illinois.

He said that if we can get over these fringe items and the dirty work, then, I think we will be a lot closer to agreement on other things. So, he began to discuss the request for additional paid holidays, and improvement in the vacation program, and improvement in the shift provisions, and when we reached the questions of pensions he said, that this was serious, that it was long over due, and he said, that it would be necessary so many cents per hour. He did not specify any amount into a pension fund, and that we should begin to set up the machinery with a joint committee for the company and the union could negotiate, and install a pension plan.

He said, that he thought that hospital, and surgical provisions should be improved.

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he said, that it was not the union's intention that the hospitalization, and surgical benefits be increased.

He said, what is this costing the company now, and what can we do with that much money. The union's feeling that instead of Blue Cross-Blue Shield insurance that it might have been possible to attain some other type of insurance that would give the employee better benefits at the same cost. The company was paying for Blue Cross-Blue Shield.

At this point the Union suggested that a committee be appointed composed of the company and the union for the purpose of holding some meetings in order to determine whether or not something should come out of this joint committee looking toward increasing the benefits for hospitalization, and medical insurance without any additional cost to the company. This committee was selected by management, and by the union, and I believe, at one or possibly more meetings. He talked about the interchange of employees.

After making the statements that he did the company decided to hold a conference in another room which lasted about three hours, and at the end of the three hour conference the company came back into the negotiating room, and stated that it was willing to appoint the committee that the Union had requested, and that

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this committee was to be organized for the purpose of investigating the hospitalization program, and to determine if better and more improved benefits at the same price could be obtained.

At this point management stated that it had reviewed the request for additional benefits that the Union had talked about and it was the company position that these fringe benefits amounted to 28 and three quarter cents per hour without taking into account any possible wage increase or any amount for a pension plan.

At this point management stated that it was not an attempt on the part of the Union to assist the company in its strive to keep its wages, if not constant, at least, comparable to its competitors, that to exceed (sic.) to these demands at this time without even considering the wages and pensions, and benefits, besides some important contract language that the company felt would be beneficial to it, and the administration of its yards, that these requests were entirely out of line, and the company representatives would be and were quite perturbed about it. I would not say they were angry, but quite disappointed.

After the company made its speech, Alexander then stated, that he believed if the company would go over these proposals more carefully, and would give them

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further consideration, that maybe the company would not find that these requests were quite as serious as the company was making them out to be, and he said, that he felt there were areas whereby these fringe benefits might be improved.

Mr. Alexander said, that he did not think that the amount of 28 and three quarter cents estimated by the company was correct. He said, that he felt that if the amount was less than that, and I believe that management answered him that it made no difference whether it was 28 and three quarters cents an hour or 20 cents an hour, it was still a whopping amount to request in the form of fringe benefits.

Specifically, Mr. Alexander said on that night, he said, we came down from the shorter work week. We made some proposals to the cost items. He said, the company is talking about a cost, and as to vacations I think the company ought to do now is to make some type of counter proposal.

He said, this is the Union's position on all of these items, and we asked the company to consider them, and make some counter proposals.

At this point the meeting adjourned with an agreement to meet on the next day on June 21st in the morning.

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At the June 21st meeting the discussion had to do with changes in contract language. We then met again on June 22nd at nine in the morning, and at this time we were still talking about hours of work and shifts, and other contract language.

No mention was made of any of the many issues, and when we did get to any money issues both sides agreed to pass those questions for the time being.

He (sic.) continued to meet on the 22nd of June, and at that time I believe, the Union explained that Mr. Clark of

the Electrical Workers Union, and Mr. Crawford of the Carpenter's Union were going to represent the committee to investigate the hospitalization plan.

We continued to discuss changes in contract language on the 22nd of June.

On the 23rd of June we continued to discuss contract language, such as the overtime provisions and were shift work was necessary, and vacations, and holiday pay, and then, at the afternoon session on June 23rd, 1961, Mr. Alexander said, that the Union would like to present a revised proposal, and it would like the company to do the same. He said, we have not accomplished quite as much in our meetings up until this time as we had hoped to or as we should have, and

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he said that we would like to look over your proposals, and we would like you to look over ours, and we will suggest another meeting.

It was then agreed that the meeting would take place on July 5, 1961 at two o'clock in the afternoon.

On or about June 29, 1961 the Union sent me in the mail the proposal that it wished the company to consider for the July fifth meeting.

We received it on June 29. It was for the purpose of giving the company an opportunity to check over these proposals so that it would be in a better position to discuss them at the meeting, which was scheduled for July fifth, 1961.

The proposals that were presented by the Union did not make any mentions of any general wage increase, but for the first time it did request ten cents per hour, that the employer shall contribute; ten cents per hour for a pension plan.

However, these proposals for the July fifth meeting did change downward some of the Unions previous requests for other fringes. Such as, holidays, and several other provisions that we originally said would cost 28 and three quarter cents per hour.

However, it was supplanted by the request for ten cents per hour for pension plan where previously no

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particular amount had been mentioned. This session on July fifth was at 2:00 p. m.

At this July fifth session we discussed excessively dirty work, vacations. We continued to meet into the evening of July fifth, and it was then agreed that we would then meet again on July sixth, which we then did.

On July sixth we spent quite a bit of time exchanging terminology of the machinery for adjustment of complaints. We also talked about a provision pertaining to shifts, and several other items, and then, at this session on July 6, 1961 there were still—they were still submitting contracts changes that had not been agreed upon. There was not any specific request for wage increases or some of the fringe benefits that the unions had originally asked for had been reduced. It was supplanted as I said before by an increase of ten cents an hour for the pension, and on this date then, at about ten minutes to five the company suggested that it would be better to utilize the services of the Federal Mediation and Conciliation service.

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Trial Examiner: Go ahead, Mr. Kossoff.

The Witness Cavano: The Company said at about ten minutes to 5:00 on July 6th that there were so many matters upon which agreements still had to be reached, we

thought it would be best to utilize the services of the Federal Mediation and Conciliation Service. Mr. Alexander stated that he didn't think very much of the facilities of the Mediation Service; that he had used them in the past, and that he had not had very good results.

However, he said, "If that is what the Company wants, I don't know why we can't continue to bargain. I think that we can do just as well across the table from each other as we could at any Mediation Service", but he said, "If that is what the Company wants, I have no objection to it."

I thereupon called the Federal Mediation and Conciliation Service, and arrangements were made at that time, on the telephone in the hearing room, for a meeting on July 19th, 1961, at 9:00 o'clock in the morning. We did, then, July 19th, 1961, meet at the Federal Mediation and Conciliation Service in Cleveland, Ohio, and Commissioner Gilbert Seldin had been assigned as the conciliator in our matter.

At this meeting on July 19th, 1961, we began to discuss contract language again. There were some changes on the part of the Unions with reference to some of its previous demands. When we reached money items we agreed to pass them

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again. At this time, on July 19th, the Union agreed to delete election day as a paid holiday from its proposals. A discussion took place with reference to vacations and seniority and excessively didn't (sic. dirty) work, and some other changes were made.

We requested in our negotiations to change the contract to provide that the agreement was to be between the International and its locals, and the Unions did not wish to have the locals inserted in the contract but preferred that it remain as a contract with the International Union.

We talked about the no strike, no walkout clause, limitation on production. safety, tools, and a number of other items. The Union, incidentally, presented a number of new additions to the old contract. and we discussed quite a few of those.

On this date, July 19th, 1961, the Union for the first time made a request for a general or across the board wage increase. This statement was made by Mr. Alexander, that the unions are asking twenty cents per hour across the board increase. We continued to discuss items. We did not go into the general wage increase problem.

We met again on July 20th, 1961, at the Conciliation Service, and we were not getting anywhere at all in our negotiations. Finally, we had a meeting between the Unions and the Company at about 4:00 o'clock on the 20th and at

that time a statement was made by Mr. Alexander, who was acting as chairman and spokesman for the Union, that the Company's past labor negotiations had led the locals to mistrust the Company; that in 1958 the Company said that it had lost millions of dollars, could not afford any kind of a wage increase, and yet the Unions, after going out to strike for a period of about ten weeks, were able to obtain a three year contract of eight cents per hour for each of the three years; That this indicated to the Unions that when the Company said that it was not doing well in business and that when it had competitive conditions, that apparently the only way in which the Unions would be able to obtain a wage increase would be to strike again. Mr. Alexander said this was not the desire of the Unions, they did not wish to strike. He believed it was possible by continued negotiations to reach an agreement before the expiration date. He said, "Let us try to continue to bargain and negotiate to the

best of our ability." He said, "I'm opposed to strikes." He said, "Nobody wins when a strike occurs, and I'm sure that we'll be able to come to some agreement if we keep working." He also said that, "My people with whom I'm dealing here tell me that everything the Company does is suspect that you are under suspicion. The membership in the local unions feel that you are not treating us like grown ups. You are not approaching this problem in a true sense of bargaining."

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When Mr. Alexander completed his comments, I took it upon myself to answer and told him that we had been bargaining in every good faith; that we had entered these negotiations from the very beginning with the intention of creating a new area of understanding. I stated that I had heard about the 1958 strike. I said, "I heard that the Union was displeased because the then labor relations director had inserted the Company's proposals in the newspapers before they were even presented to the Unions." I said that there would no newspaper publicity this year as far as the Company was concerned; that we were meeting in as free a manner as we possibly could; that we were desirous for the first time in a good many years of negotiating a contract without the necessity of a strike or labor dispute, and that the Company was very hopeful to this end.

At this point, July 20th, one of the members of the group of eight unions, Mr. Clark, representing the Electrical Workers Union, asked if he could make some comments, and Mr. Alexander told him to go ahead, and he then said that there were three or four items that he felt that were important in all of these negotiations; that if we would get them behind us, that maybe we would be closer to an agreement. He suggested three or four items in the contract

that he thought we might be able to reach an agreement upon, and after separating from each other and going into separate

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rooms, we were, that night, able to settle on three or four items that had been snagging us, and we then became rather hopeful again that perhaps we might be able to reach an agreement, because we did feel that these items that we talked about, that by getting those behind us, we were then on our way to negotiating in good faith.

Also, on July 20th, at 11:20 in the morning, the Painter's Union representative entered the meeting room and presented a number of demands for the very first time and requested that we begin to negotiate on those in addition to the many other items that we had been talking about prior to that time. The Painter's proposals were taken under advice by both Mr. Alexander and also by the Company for further discussion.

My notes indicate, and from these notes I recall that—that the next meeting took place on Friday, July 28th, 1961, at the Conciliation Service, and on this day Mr. Young journeyed to Cleveland again from Washington and introduced to the assemblage Mr. Gallagher, who was a Regional Director for the American Federation in Cleveland, and who Mr. Young said was a very good friend of the Boilermaker's Union. We then proceeded to negotiate further with reference to vacations and Christmas and New Years Eve, as to whether they were to be paid holidays or merely a day off, and then the question of guaranteed holidays became a question of

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quite a bit of discussion, Good Friday and the half day before Christmas and the half day before New Years, and that

these holidays be guaranteed, and then the Unions were requesting an improvement in the vacation program, which would have cost the Company some additional money, and the ten cent pension program and so on.

This day, the 28th of July, the Unions' demands upon the table and the Company's opinion amounted to forty-two cents an hour. The Company stated that the Unions' request for holidays would cost it five cents per hour; that the Unions' request for improved vacations would amount to two cents per hour; that the safety and nurse provisions would amount to five cents per hour; that the pension would amount to ten cents per hour, and the wages were twenty cents per hour for a total of forty-two cents.

During these negotiations, the Union, to Mr. Alexander said that if we would make some changes in the holiday provisions that they would withdraw their request for Good Friday as a paid holiday, but they still wanted Christmas Eve and New Years Eve to be considered as a holiday and not as a day off. We had quite a bit of discussion on that question, because the Union said that they understood the Company to mean that the day before Christmas and the day before New Years were to be a holiday and not as a day off. We then discussed the lay off notice in the contract and

other discussions took place on July 28th with reference to group life insurance, sickness and accident insurance, then at about 10:00 o'clock at night on July 28th the meeting was adjourned until the next morning, which was a Saturday.

On Saturday, July 29th, we met again with the Unions and we discussed the various demands that the Unions made, and it was then brought—it was again brought to the attention of the Unions that the various fringe benefits plus pensions, plus wage increases, came to forty-two cents per

hour. My notes do not show this, but I'm pretty sure that on July 29th, 1961, Mr. Alexander stated that the information that they had indicated that the national average for shipbuilding companies in the first six months of '61 amounted to eight and three cents per hour; that that was —Excuse me, I believe that was the statement that was made by Mr. Midnight to Mr. Alexander on July 29th, as to what the general wage pattern in the shipbuilding industry was for the first six months of '61.

Trial Examiner: You mean the increase is granted?

The Witness: Yes, increase is granted.

Would I be presumptuous in asking for a break, sir?

Trial Examiner: No, take five minutes.

The Witness: Thank you.

(Short recess was had.)

Trial Examiner: The hearing will be in order.

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The Witness: Our next meeting with the Union was on July 31st, 1961, at the Conciliation Service.

Trial Examiner: What date did you say in July?

The Witness: July 31st, 1961.

Trial Examiner: All right.

The Witness: This session lasted from 9:00 to 12:00, from approximately 1:30 to 5:30 P. M., and from about 8:00 P. M. until 3:30 A. M. on August 1st, 1961. At about five minutes to 12:00 on July 31st, the Company made a proposal to the Unions—actually, it was two proposals. At about 1:00 o'clock in the morning the Boilermaker's made counter proposals. They rejected the proposals that we had made and made a counter proposal. Their counter proposal provided for remaining—for the overtime provi-

sion of the contract to remain as in the previous agreement except to add an additional sentence that would give the men sandwiches and coffee and milk in case they worked past a certain time, and to have Christmas Eve and New Years Eve as holidays for all purposes, and to make the holidays guaranteed, including Christmas Eve and New Years Eve, to change the overtime hours to actual hours worked, which would include overtime hours, which was not in the previous agreement, that as to hospitalization, the committee that had been appointed in June to continue, they then asked five cents into a pension plan. They proposed a one year agreement,

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and as to wages they requested nine cents per hour.

At this session, the demands of the painters who had presented their proposals in July were still on the table, and to be discussed. At this session, sometime in the morning, we were aware, of course, that our contract had expired, and at this session Mr. Alexander asked me, "Will you extend the agreement?" I answered, "No". He made no further statement with reference to an extension of the agreement, nor did I .No further conversation of any kind took place with reference to an extension at this time and at this place.

The Company then recommended then that its Proposals Number 1 and 2 be presented to the membership for a vote. The Unions indicated that they would present the proposals to the membership for a vote, but they would not recommend its adoption. The Company then decided to put these proposals in writing in an effort to get the proposals directly to the membership so as to give them an opportunity to consider Proposals Number 1 and Number 2, and it

did so, and the proposals in writing are now in evidence as an Exhibit.

At this time there was no arrangement for any other meeting. The meeting was not suspended subject to further call, but on August the 2nd, 1961, I received a telegram from Al Young, whom I know as Lonnie Young, which is now in

the evidence, in which he stated, among other things—

Mr. Mamet: I object to restating a telegram.

The Witness: That he would be included—

Trial Examiner: Well, you are going to tell us—

The Witness: If it's material. I'm not going to tell you what is in the wire, I'm only going to tell you what he said about the meeting.

Mr. Mamet: Personally, is this, to you?

The Witness: No, what the wire contained.

Mr. Mamet: The wire is in evidence.

Trial Examiner: Well—

Mr. Mamet: He is not relating a conversation.

Trial Examiner: I know. I know this is a practical problem. He can paraphrase. If it's in evidence, it will give us some continuity here. Go ahead.

The Witness: The telegram stated that Mr. Young would be in Cleveland and available to meet with the Company and with the Unions and to remain in Cleveland for that purpose for several days. Upon receipt of that telegram a meeting was scheduled and duly took place at the Conciliation Service at Cleveland on August the 8th, 1961. At this meeting, Mr. Ted Pelz—

Trial Examiner: Spelling.

The Witness: P-e-l-z, who had been originally selected to represent the Boilermakers in its affairs with the

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American Shipbuilding Company, was present at the meeting.

Mr. Young was there, the various Unions were present, and at this time Mr. Pelz stated that he wished to make an announcement. He suggested that we adjourn to lunch at the Sheraton-Cleveland Hotel, and that the Unions and the Company representatives share their lunch together, and that the representatives not talk shop but that they should break up so that one company representative would be sitting next to one Union representative, and this was done, and the luncheon lasted until about 3:30 in the afternoon. At 3:30 in the afternoon when we went back to the Conciliation Offices, Mr. Young made a speech. He said, "I do not believe that the Company has really meant what it proposed on August the 1st. I think that the Company can extend itself still further. I do not think that there should be a three year agreement, especially because of the condition of the shipbuilding industry which the Company states that it is faced with." He said, "We recognize that you have competitive conditions." and he said, "in the light of these competitive conditions, we think that instead of a three year agreement, you should work on a one year agreement." He said, "It's too much of a gamble to work on a three year agreement." He said, "The United Auto Worker's Union have their agreement coming up pretty soon," and he said, "whatever benefits they receive over and above what they have had in the past will

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undoubtedly rub off on us, and we don't think that you have gone far enough in your offer." He said, "To attempt to

alleviate your conditions over a three year period would be disastrous, in our opinion."

Mr. Midnight then answered the statements, and he said, "We felt that the Union wanted a three year agreement, but if the Union wants a one year agreement, then we do too, because we recognize that the condition of the industry is poor." He said, "We have very little work in prospect . . . We don't know how much work we are going to be able to get", and he said, "As far as we are concerned, we would just as soon have a one year agreement," and so he said, "If that is what the Union is asking for, we then suggest that the Union accept Proposition Number 2, or Proposal Number 2, and the letter that we sent to the employees or arranged to have delivered to the employees are on August the 1st, '61, and that everything else would be as in the old agreement except those items for changes that had been previously agreed upon." Mr. Midnight said, that on a three year contract basis we offered to incorporate the national emergency clause of the National Machinists agreement, so that in the event there was a national emergency of any kind, the contract could be opened for wages in the event of that emergency.

At about 1:15 in the afternoon the offer that the

Company made was rejected. They said that the Union said that the national emergency clause wouldn't do them any good because that would mean that the contract would have to be reopened anyway, and the Unions felt that on a one year contract that the pension should be five cents to be effective maybe in six months; that the money should be five cents; the guaranteed holidays and the insurance committee to continue.

At this meeting, the Unions said that any agreement that was entered into between the Company and the Unions would have to become effective as of the date of the agreement or as of the date of signing the contract and not as of August 1, 1961. At 5:00 o'clock on this day, August the 8th, 1961, we met with the Unions across the table. Mr. Seldin, the conciliator, S-e-l-d-i-n, explained the position of the parties, particularly with reference to the overtime provisions that the Company wanted incorporated in any new agreement, and it became apparent at this meeting that the effective date of the new contract would be the date of the signing or the date of the agreement.

Mr. Young, at this time, made another speech in which he stated that, apparently, he had contributed nothing so far to a solution of the problem. He said he didn't feel that his remaining there at the meeting would be of much help. We then went into a discussion of the hospitalization

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program, and the Company said that we thought that we could work out an arrangement whereby laid off employees would be permitted to pay the group rate directly to the company for a period of six months, thereby giving them some benefit in the cost of hospitalization in the event of a lay off.

We met again on August the 9th, and at this time the Company made a proposal of a three year contract of no wage increase for the first year, five cents per hour for the second year, and five cents per hour for the third year.

Trial Examiner: Did you say August 9th?

The Witness: August 9th.

The Trial Examiner: That's two meetings in a row, 8th and 9th?

The Witness: Yes, two meetings in a row.

Incidentally, the Unions had previously told . . that their locals had taken a vote and had voted to strike if an agreement was not reached.

On August 9th at about 11:00 o'clock, the Company made a final proposal for acceptance by the Unions of five cents, five cents, five cents, in a form of a general wage increase for a three year agreement, and that the Unions would slice this up in any way that they wanted to between pensions, group hospitalization or cash across the board. The Company stated that it wanted one plan of

hospitalization, health and welfare and pension with the Machinists Union as well as with the group of eight. The Company had been negotiating with the Machinists Union in the interim between its negotiations with this group of eight, and the Company wanted to be certain that any contracts that was entered into, it stated, would be uniform with reference to the Machinists as well as the Boilermakers contract, and that is the reason that Mr. Midnight stated that the five cents, five cents, five cents per hour across the board wage increase in the event that any portion of that five-five-five was to be used for pension or health and welfare, that it should be uniformly applied, and the same kind of a plan with the Machinists and with the Boilermakers.

Mr. Midnight said that "If you want a pension for the first year, both the Machinists Union and the Boilermakers must agree that there will be a pension the first year. If there is going to be a health and welfare plan for the second year, then the negotiations will have to work out in such a way that the Machinists and the Boilermakers health and welfare plan would became effective in the second year." In addition, Mr. Midnight still stated that he felt that vacation provisions of the Machinists agreement should

be incorporated into any agreement we might make with the Boilermakers. Mr. Midnight said that, "We are not interested in guaranteed

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holidays." He said, "we are not interested from the standpoint of principle." He said, "Take the fifteen cents over the three year period and cut it up into health and welfare and so forth, and we would like to have an answer from you by midnight."

Shortly after midnight, the Boilermakers' answer was that they were rejecting the proposal of the Company. They stated they would not take it back to the membership. They made no counter offer and the meeting adjourned at 12:30 in the morning on the 10th of August, 1961.

The next meeting took place on August 19th, 1961, at the Conciliation Service, and we discussed hospitalization, vacation plan, and at this time the Company said that instead of guaranteed holidays we would grant a full day off before Christmas and New Years where they fall on a working day, but this is not to be considered a holiday but a day off with pay, and that the pension plan should be a basic plan that would be the same with the Machinists Union as it would be with the Boilermakers.

Mr. Midnight stated that he believed that a pension plan, if it was introduced by the Company, that it would be equal to the pension plan that the Machinists already had in effect for its other members in our companies. They discussed in detail the health and welfare, sicknesses and accident insurance, and Mr. Midnight stated that the Company

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would like to buy this insurance and that he would like to have it contain provisions similar to the Machinists agreement.

This meeting adjourned at about 7:45 in the evening on the 19th. I beg your pardon, it adjourned for dinner at about 10:40 at night on August 19th.

The Boilermakers offered a one year contract as follows: Five cents in wages across the board, effective as of the date of signing of the agreement; five cents an hour into a pension plan to start January 1st, 1962, and guaranteed holidays. I beg your pardon, this was a proposal by the Boilermakers for a two year agreement. The second year they proposed six cents per hour into a health and welfare plan.

After receiving this counter proposal from the Boilermakers, the Company, through Mr. Midnight stated that it desired a three year contract. First, it would provide five cents an hour for a pension plan equal to the Machinist Pension plan, and that it would grant December 22nd, '61 as a full day off with pay but not as a guaranteed holiday. For the second year, he proposed eight cents per hour in the form of a wage increase and a full day off on December 31st and not as a guaranteed holiday, and the third year the health and welfare program, which would be equivalent to the Machinist health and welfare, which would include

$2500 as life and accident insurance and dismemberment, and for to continue the Blue Cross and Blue Shield program with coverages agreed upon. This was presented to the Boilermakers Union and it was rejected by them at five minutes after 1:00 on the morning of August 20th, and they stated they would not take it back to the membership. The reason they rejected the proposal was they said the coverage was not enough. They insisted upon a joint administration of the pension and health and welfare plan, and they felt that New Years Eve and Christmas Eve should be a

holiday and not a day off, and they wanted to continue the hospitalization committee, and the contract was definitely to become effective on the date of signing the contract and not as of August the 1st.

On August the 20th, at about 2:00 o'clock in the morning, it was apparent to both sides that it was useless to continue to negotiate because by this time the question of the effectiveness of the contract became important. At about 3:15 in the morning—

Trial Examiner: I didn't understand that last statement. The effectiveness of the contract—

The Witness: Well, by this time, and at previous meetings, the effective date of the agreement was an outstanding consideration.

Trial Examiner: All right.

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The Witness: At about 3:15 in the morning of August 20th, Mr. DeJac, one of the representatives of the Buffalo Local asked for a five minute recess, and after the five minute recess was over it was decided to adjourn the meeting, and it was adjourned.

We met again on August 28th, 1961, at the Conciliation Service, and at this time two new conciliators were representing the government agency instead of Mr. Selvin. Messers. Duffy, and Tilton.

Most of our discussions on this date took place with the mediators going back and forth between the Company and the Unions, and a number of matters were considered by both sides at this meeting, as I said, the parties did not meet together or face each other at this meeting on the 28th.

On the 29th of August we met again, and at that time we again made a final proposal to the membership, and we

asked that it be presented to the membership for a vote. At this time, the 29th of August, Mr. Alexander stated that inasmuch as the Company took it upon itself to prepare the August 1 proposal in writing for presentation to the Membership, that it would be a good idea for the Company to prepare its written proposal for presentation to the membership in the form of a letter, have this letter spell out exactly what the Company's final proposal was, and at that time the agreement was that the written proposals were

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to be mailed by the Company to the managers of the four ship yards so that the Union representatives could go to the ship yards to pick up these proposals inasmuch as some of the Union officials were on lay off and were not available in the ship yard to pick them up. However, several of the Union representatives asked that in addition to leaving the printed proposals at the ship yard offices to be picked up by the Union representatives, that some of these people be mailed copies of the September 1st proposal.

Mr. Grambo, representing Local 374 of the Chicago Local, Mr. Jamgoshian, the business manager of the Toledo Local, Mr. Lamar, who represented the Painters Union, Mr. Crawford, representative of the Carpenters Union, Mr. Buckolz, the representative of the Pipefitters Union, all requested that in addition to leaving the September 1st proposal at the company's ship yard, that these be mailed to them. This was done, and in addition, a copy was mailed to Mr. Alexander, at his request, at his home in Mission, Kansas.

On September 8th—on September 1st, then the proposal was presented in writing, and it is in evidence here as one of the Exhibits. Thereafter, I had a telephone call from Mr. Young from Washington.

On September 18th, 1961, we had another meeting at the Conciliation Service, and Mr. Young was present. At this time Mr. Young stated that he wanted to make public some

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of the items of which he had personal knowledge. He said that on or about September 7th one of the locals called Kansas City, Kansas, which is the home office of the Brotherhood of Boilermakers Union, and advised them of some action which the Company had taken with regard to unemployment compensation. Mr. Young said that, before he could get into contact with the local that had made the complaint, that the International had asked him to investigate this matter. He said that he had talked to Mr. Cavano on the telephone from Washington on the Friday previous, and he said it's my intention to go to Buffalo and to go to Lorain on about the 9th or 10th of September to present—to attend a meeting of the Buffalo and Lorain Union, and he said that he was going to present the September 1st written proposal to the membership, and he said that he was going to recommend that it be adopted with the exception of two items which he said he was going to recommend that the locals reject. One of these, he said, was the question of the effective date of the agreement. He said that under all circumstances that any contract that was entered into would have to become effective as of the date of the agreement and not as of August the 1st, 1961, which the Company had been insisting upon would be one of the provisions of any agreement. He said that in addition he wanted the Blue Cross provision to be changed other than what the Company had

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proposed on September the 1st. He stated that in his telephone conversation with me from Washington the previous

week, that his conversation with me had been quite acrimonious. He said that he felt that the Company had shabbily treated the unions because of what it had done about reference to unemployment compensation. He said that they tried to reach an agreement, and he said that they could be provoked. He said it had not been his intention to strike, but he would have been willing to call a strike if they had to, and he further stated that if he made any statements to me that were of a personal character, he apologized for them, and he was sorry. I then said that I would like to make an explanation of that unemployment compensation question. I said that this was not a new or a novel idea with the Company. I said that the Maryland Shipbuilding & Dry Dock Company engaged in the same line of business as American Shipbuilding Company; had its contract expire on August the 1st, 1958, with a different union; that that contract wasn't extended until about the 19th or 20th of August of 1958; that the unions with whom the Maryland Shipbuilding & Dry Dock Company was negotiating had taken strike votes but had not advised the employer as to when they would strike; that this information was carried in the newspaper and that upon receipt of this information, a number of the customers of the Maryland Shipbuilding & Dry Dock Company refused

to send their ships into the ship yards for repair because of the danger that they would not be able to get their ships out in the event of a strike; that the Maryland Shipbuilding & Dry Dock Company decided that this was a labor dispute and they, therefore, laid off about thirteen hundred of the twenty-three hundred men that they had working at that ship yard at that time.

I stated that these lay offs occurred the 28th or 29th of August of 1958, and the employees involved filed claims for unemployment compensation benefits; that hearings were held, and that the State Agency in Maryland has that these employees were engaged in a labor dispute and were not entitled to unemployment benefits. I further stated to Mr. Young that the matter proceeded to court in Baltimore, Maryland, and that the court upheld the determination of the Maryland Unemployment Bureau, and that these men were denied unemployment benefits. I stated that the facts in our case were almost under all fours with that of the Maryland Shipbuilding & Dry Dock Company; that this was an undissolved labor dispute and that the Company felt that it was justified in taking the action that it did.

Mr. Young replied by saying that the Union expects to win these cases, Maryland Shipbuilding & Dry Dock Company, or notwithstanding. What the Company is forcing us to do, he said, is to hire lawyers and defend ourselves and spend

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money for the purpose of winning these unemployment compensation cases, and I'm sure that ultimately when these cases are resolved, that the Company will find that the employees will be found to be eligible for unemployment compensation.

Up uptil today, not one word was mentioned in any negotiating session from the 11th of August until the 18th of September at any joint meeting between the groups of eight and the Company with reference to unemployment compensation. The only reference having been made on September 18th, in the exchange between Mr. Young and myself.

On this day, September 8th, the Company asked whether or not this matter could go to arbitration on the question

of trying to solve the labor dispute, and the Union said that they would not. The Company's offer of five cents an hour for a second year was rejected by the Union, and Mr. Young made a further statement at this meeting on September 18th that because of his knowledge in Washington with various government agencies, he said that the Company already has some contracts in its pocket. He said that the Company has a couple of very sweet contracts in its pocket, and that as soon as this contract is negotiated the Company will proceed to work on those sweet contracts.

We continued to meet with the Boilermakers Union after Mr. Young left, and we were still trying to resolve our

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problems, and in the afternoon it was suggested by the conciliator that we ought to adjourn because it was apparent ever since the first part of August that one of the principal problems that we had to get over was the effective date of the agreement; that the Company felt that any agreement would have to be effective August the 1st, whereas, the Union was insisting upon the effective date of the contract.

Our next meeting was on October 20th, 1961, at the Conciliation Service.

Trial Examiner: You are sure about the date?

The Witness: The 20th.

Trial Examiner: Mr. Alexander said the 21st.

The Witness: Was my last date September 18th?

Trial Examiner: The last was the 18th. There are no others between the 18th and sometime in October, as far as this record is concerned, but it's a minor matter, because one witness said the 21st.

The Witness: No, sir, the next meeting was the 20th, and there were no meetings in the interim between the Company and the Union.

Trial Examiner: All right, go ahead.

The Witness: On October 20th, another meeting took place at the Conciliation Service, and at this time Mr. Alexander stated that there were two things that were standing out in the settlement of this problem, he felt.

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Among other things, what he said was the—what provision the company was going to make about hospitalization insurance, and the second was the effective date of the agreement. We continued to discuss the question of hospitalization, and we then suspended about 1:00 o'clock on October 20th. I believe that was a short meeting. Yes, we met on the 20th from 9:30 until 1:00, and then that meeting was suspended.

We then met again the following day, which was a Saturday, October 21st, at 9:00 o'clock in the morning, and at this time these were the questions that were discussed between the two parties, the two sides: One, continue present coverage with benefits to begin at once, and to recall some lay offs, and this had to do with hospitalization. Secondly, the effective date of the agreement was in question. Third, an agreement with reference to unemployment compensation, that the protest be withdrawn, and with reference to hospitalization, the question had to do with whether or not if a man worked forty hours in a calendar month, that his coverage becomes effective for all that month.

At 11:00 o'clock on Saturday, October 21st, the Union stated that they were agreeable to the forty hours work in a calendar month for hospitalization benefits. At about

11:00 o'clock on October 21st, Mr. Midnight made a speech

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in which he stated that the principal reason that the company insists about an August 1st expiration date in its contract was that the Company's customers would not give it any work if they knew they would be in a position of having their ships tied up in the ship yard in time when a strike would occur. He stated that this would be economically unsound not only for the company but for the employees as well. He stated that under these conditions the customers would probably place their work elsewhere. He said that there was no possibility of being able to change the effective date to any date other than August the 1st, because to do so would place the Company in the position of having its contract expire in the middle of the winter season, and that under those circumstances no customer would give us any business. He said that in the past—

Trial Examiner: Is Mr. Midnight going to testify too? Let me ask you this question, this is my only interruption, during the winter season, this is a logical time for the ship owners to put their vessels in dry dock; is that correct?

The Witness: (Indicating in the affirmative.)

Trial Examiner: I just want the record to reflect—

The Witness: I have to qualify that by saying I don't know that much about the shipbuilding industry. Perhaps I'll pass that.

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Trial Examiner: That is why I prefaced my question by asking whether Mr. Midnight was going to testify?

The Witness: I believe the people that live in the industry will be able to testify better than I can.

Trial Examiner: All right, sir, go ahead.

The Witness: At 6:30 on October 21st we met with the Union again and the question for hospitalization for the month of October for '61 for the laid off employees became an important question, and then the Union suggested a September 1st expiration—beginning date of the contract; and thirdly, they asked that the Company drop its protest with respect to unemployment compensation. At 7:00 P. M. we stated that there had been a number of changes recommended and that it was about time that we tried to cut this thing down to some final issues. The Union said that there will be no other issues discussed than these three. If we can agree on these three, there will be no other issues raised, and if we can settle these three issues, we then can get together on reaching an agreement for a contract.

It then was agreed to meet on Sunday, October 22nd, and at that time we did meet at about 11:00 o'clock in the morning at the Conciliation Service. At the beginning of this meeting on October 22nd, '61, the Union suggested the effective date of the agreement be September 1st, 1961. They asked the Company to drop its protest with reference to

unemployment compensation, and they asked the Company to pick up the October hospitalization for employees that were laid off since August the 11th, if they were called back to work in October, and that we would pay their premium. We agreed to the Union's request with reference to picking up the October premium for Blue Cross for all those laid off on August the 11th, and then after if they returned to work, and we still asked for an effective date of the contract as of August the 1st, '61, instead of September 1st; and, thirdly, we explained to the Union the situation

with reference to unemployment compensation; that the Company had filed protest in Ohio and New York, and that the Company would be willing to withdraw these protests which would enable the employees to collect their unemployment, but that in Chicago the situation was different, and that the Company would assist the Chicago employees in every legal way possible so that they too could have similar treatment as those in Ohio and in Buffalo. We continued to meet until about 4:30 in the afternoon, and finally at that time an agreement was reached whereby the contract would become effective August 15th, 1961, and if the new agreements are not in the evidence and if the hearing officer deems it advisable, I'll present those and make them as part of the contract—part of the evidence.

Trial Examiner: The new contract isn't in.

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Mr. Mamet: No. We probably should have it.

The Witness: We have it here, and when I finish, I'll introduce it.

Trial Examiner: All right.

The Witness: The final thing was to present the final proposal to the membership, and the proposal was that we would accept the hospitalization, we would accept August 15th contract date, and we would carry out our agreement with reference to unemployment compensation.

Mr. Alexander then asked on Sunday, October 22nd, that the Company state in writing that would withdraw its protest with reference to unemployment compensation and that it would also state in writing that it was willing to do or what it would do as to unemployment in the State of Illinois, and in addition that the Company complete the rest of the wording or language of the contract and try to

get it into the hands of the various parties as quickly as possible. Accordingly, on October 24th, 1961, the Company sent to Mr. Alexander, who was staying at the Sheraton-Cleveland Hotel, the letters with reference to unemployment compensation, the letters with reference to hospitalization benefits, and all of the chapters in the new agreement that were to become effective as of August 15th, 1961.

On that same date, October 24th, 19[illegible], a letter was written to the other local unions at Hammond, Indiana,

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and the other locations, advising them of what we had sent Mr. Alexander, and arrangement was made for a meeting on October 27th, 1961, for the purpose of signing the agreement, and on that morning, Mr. Alexander called me at my offices and stated that he had heard that the Chicago Local of the Boilermakers Union had filed an unfair labor charge against the Company with reference to unemployment compensation. He said he was sorry to have to tell me this, and he said it was a surprise to him. He had no knowledge of it, he didn't know just where we go from here." But he said, "I know we are supposed to meet this morning, and I thought you would like to know." I said, "Now, this comes as a surprise. I haven't received the unfair labor charge. I know nothing about it. I have heard nothing from anybody about it until you mentioned it to me now, and we are going to meet this morning." So, we met on October 27th in the morning. The contracts were signed, and at that time I had no official knowledge from the National Labor Relations Board that this unfair labor charge had actually been filed, what it contained, or any information therein.

Those were the negotiations up to and including October 27th, 1961.

Q. (By Mr. Midnight.) Mr. Cavano, is there anything further that you might add as to the facts or questions

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regarding the extension of this agreement? A. None other than what I have already testified to.

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Q. (By Mr. Midnight.) Mr. Cavano, while all these negotiations were being reviewed that were going on with the Boilermakers group, were meetings being held with the Machinists, the I.A.M. Union, at the same time? A. Yes, they were, during interval periods.

Q. And do you have notes on those also? A. Yes, I do.

Q. Would you like to review the highlights of what transpired at those meetings?

Mr. Kossoff: Objection.

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Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record. How much of this do we really need? It hasn't been testified by the General Counsel, however, I can imagine that there might be some relevance as far as motivation is concerned on the Respondent's part, but whatever relevance there is or materiality, I hope you will keep this to the barest minimum.

The Witness: This I will do.

Mr. Mamet: Now, is that—

Trial Examiner: Would you mind, would you tell us what materiality you think this is to the I.A.M. negotiations?

The Witness: I believe there is some materiality with reference to one of the meetings that took place between the Machinists and the Company having to do with motivation. I do not intend to go through item by item, provision by provision, contract by contract, but there were some statements made by the Machinists Union that I believe go toward the motivation.

Trial Examiner: Toward the Company's belief about something?

The Witness: Statements that were made to the Company by the Union.

Trial Examiner: All right.

Mr. Mamet: Relative to the Company's belief about

something, relative to us, to these unions under this contract, these are separate negotiations.

Trial Examiner: The issue here is the lay off of certain people and the consequent—not necessarily the consequent, but subsequent at least, loss of unemployment compensation. How do the I.A.M. negotiatioins bear on lay offs of employees as alleged in the complaint?

Mr. Mamet: There are no machinists alleged.

The Witness: A number of meetings were held between the Company and the Machinists Union both at the Sheraton-Cleveland Hotel and at the Conciliation Service, which resulted in a new agreement with the Machinists effective August the 1st, '61, which is now the part of the evidence in this case.

Trial Examiner. All right.

The Witness: On July 26th at one of these meetings—

Mr. Mamet: Pardon me.

Trial Examiner: You haven't answered my question. What—I don't want you to make an offer of proof, but just suggest to me what any one of the I.A.M. meetings had to do with the lay off of Boilermakers, for example, to the issue in this case?

The Witness: I would say that it would be important to the standpoint that the machinists worked in the same ship yards as the boilermakers.

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Trial Examiner: So did the clerks.

The Witness: Sure.

Trial Examiner: So, what do we have—I think you know your case, and I don't want to suggest to you something which I think you must know. If during the I.A.M. negotiations they said, "We can't agree and we are going out on strike, or a strike is imminent, or we won't give you a guarantee of a days production", or things like that, and as a consequence you had to lay some people off or you didn't take orders or didn't take repair jobs, I think that would bear upon the layoff of everybody. Is that what you are driving at?

The Witness: Exactly.

Mr. Mamet: Thanks for the offer of proof.

Trial Examiner: This line of cases is well known, Mr. Mamet.

Mr. Mamet: Yes, I think that is true. We are familiar with it. There has been no contention at any point here that the Machinists were related or had anything to do with us.

Trial Examiner: No.

Mr. Mamet: It's really outside the confines of this entire case. It comes in here—The man is sitting as an attor-

ney with notes testifying in narrative form. If he wants to go into these negotiations as it bears upon us,

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this may extend this entire trial until we can dig up machinists who were there. We weren't there. We know nothing about it. At no time during Cavano's summary—I use the word in its rather loose sense—of the negotiating sessions, did the question of machinists come up, as to what he said, as to what the boilermakers said, as to anything. At no time when he discussed the reasons when the plant managers got together on August 10th and determined to lay off, did the question of machinists come up.

Trial Examiner: He has never told us why he laid them off at all. He said they took certain action. They decided on certain action. No reasons have been given. I want to hear the testimony. I think what you say goes to the amount of weight that I will give to it, whether it's a question that can be argued by you and General Counsel as anything, as being argumentative on the Company's part, or speeches or afterthoughts, but so what. On the question of motivation, I want to hear it, but as I see, I want it kept to a minimum. Whether it results in a prolonged hearing, that is another problem.

Mr. Mamet: As I understand it, this witness is testifying from his notes, and he has been turning them over, and he is going to find certain sections of his notes.

Trial Examiner: Apparently he is looking through his

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notes and he is testifying from his notes.

I guess you have no independent recollection of the machinists' conversation either?

The Witness: Not too well without refreshing my memory.

Mr. Mamet: I'll see.

The Witness: Many meetings took place between the Company and the Machinists Union separately from the meetings with the Boilermakers group in between, I might state. July 26th at the meeting with the Machinists Union, Mr. Midnight explained the condition of the shipbuilding industry in essentially the same manner and to the same degree and extent as he ha with the Boilermakers with reference to bringing the other shipbuilding companies into competition and its competive condition of the industry as a whole, and he said that he felt that matters should remain in status quo, and that meeting at 2:00 o'clock in the afternoon Mr. Schwartzmiller who is representing the Machinists Union said, "If we don't have a settlement, we'll strike. If you settle for nothing, we won't buy it." He said at this same meeting that the national average was eight and two cents per hour for the first six months of 1961 in the shipbuilding industry, and for the company to say that it wished to hold the line in wages was not holding up to the national average, and for this reason he would not accept

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any settlement on the basis of no increase, and if that is what the Company wanted, there would be no strike.

I have nothing further with reference to the conversation with the Machinists Union.

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CHARLES CAVANO:

Cross-Examination.

Q. (By Mr. Kossoff.) Mr. Cavano, I show you a copy of your notes for the meeting of July 19th, and I ask you if the—if it isn't the fact that by July 19th of '61 the Union and the Company, that is, the group of eight unions and the Company, had agreed to the following clauses in the contract, or the following article: Articles 1—Perhaps I will take them numerically, and you comment as I give each number. Article 1? A. We were in agreement.

Q. 2? A. We were in agreement.

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Trial Examiner: Are you going to tell us what these articles are later?

Mr. Kossoff: I think the contract is in evidence.

Trial Examiner: Article 1 is probably recognition of the Union. Which one is it?

Mr. Kossoff: This is '58—This is '61.

Mr. Mamet: It's probably management's rights.

Trial Examiner: 2 is management's rights. We get to the unit.

The Witness: We just don't happen to have a management's rights clause in our contract, sir.

Trial Examiner: Give it to me. Next question.

Q. (By Mr. Kossoff.) 2, I think I was on 2 now. A. We were in agreement.

Q. 3? A. We were in agreement.

Q. 4? A. We were not in agreement.

Q. 6? A. Are you skipping 5, sir?

Q. Yes. I assume 5 was not—I thought you were in agreement on 4, but I was wrong.

Trial Examiner: They were not in agreement on Article 6, which was wages, certainly, unless I haven't been listening to the testimony for two days.

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Mr. Kossoff: Well, I'm going by his notes. Now, perhaps I'm misinterpreting his notes.

Q. (By Mr. Kossoff.) Does this Number 6 refer to Article 6? A. Yes. That only meant the terminology of Article 6.

Trial Examiner: Oh, "Wage rates shall be whatever agreed upon."

The Witness: Yes. That would be in Schedule A, sir. Article 6, we were in agreement as to Article 6.

Q. (By Mr. Kossoff.) 7? A. We were in agreement.

Q. 8? A. We were in agreement.

Q. 9? A. We were not in agreement.

Q. Well, now, what does your statement in your notes mean, "Agreed as we presented it on 7-5-61?" That is what throws me off then. A. I see. Article No. 9, the first paragraph, agreed. The second paragraph, they still want in, as it is a money question. The third paragraph, call in time, we are in agreement.

Q. I see. Then, two of the three paragraphs you were in agreement on in Article 9? A. Yes.

Q. Article 10?

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A. This was passed as a money item.

Q. Article 11? A. We were in agreement.

Q. Article 12? A. We were in agreement.

Q. Article 14? A. We were in agreement.

Q. Article 16? A. I'm not sure from my notes.

Q. Perhaps if we started with Article 16, could you tell us? A. I might.

Trial Examiner: Distribution of overtime.

The Witness: What?

Trial Examiner: Overtime problem. All overtime work shall be equally and partially—

The Witness: I believe we were in agreement.

Q. (By Mr. Kossoff.) Article 19? A. We were in agreement.

Q. Article 21? A. I believe we were in agreement.

Q. Article 22? A. We were not in agreement.

Trial Examiner: It's a no strike clause.

The Witness: We were not in agreement.

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Q. (By Mr. Kossoff.) Article 23? A. We were in agreement.

Q. Article 27? A. We were in agreement.

Q. I direct your attention to the next page of your notes, and ask you if you were in agreement on Article 22? A. No, we were not.

Q. Will you explain the statement "We ask—" A. We ask it remain as in the present agreement.

Q. I see. I misinterpreted.

Article 23? A. We were in agreement.

Q. Article 27? A. We were in agreement.

Q. Article 29? A. We were in agreement.

Q. Article 30? A. Agreed.

Q. Article 31? A. I believe we were in agreement with that.

Q. That's— A. That was the apprenticeship program. I'm pretty sure we were in agreement.

Q. Now, Mr. Cavano, isn't it a fact, that at the July 31st and early morning August 1st meeting, that the Union

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did make an offer for a six month extension of the agreement? A. No.

Q. Isn't it a fact that Mr. Midnight did tell you that the Union did make agreement—didn't make an offer to extend the agreement for six months? A. I object to the question.

Trial Examiner: What grounds?

The Witness: What Midnight said to me.

Trial Examiner: This is cross examination. It's whether you knew. The objection is overruled.

The Witness: Repeat the question, please.

(The pending question was read by the Reporter.)

The Witness:

A. No, until you place the date.

Q. (By Mr. Kossoff.) Did Mr. Midnight at any time tell you at the August 1 meeting the Unions had offered to extend the agreement for six months? A. No.

Q. Did you give a statement to myself as an agent of the National Labor Relations Board in which you referred to a six month extension offered to the Company by the Union? A. Yes.

Q. Did you, in your statement, tell me that Mr. Midnight had told you that the Company—the Union had offered to extend the agreement for six months and that Mr. Midnight

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had turned it down? A. May I see the affidavit, please?

Q. This may refresh your memory. I may also show you a letter. A. This affidavit which I supplied the National Labor Relations Board, dated November 16, '61, states Mr. Midnight informed me that when Mr. Alexander asked him if the Company would extend the contract another six months, Mr. Midnight stated that, of course, it would not do so since to agree to that would permit the contract to end right in the middle of the Company's busy season, and would not be beneficial to the Company or to the employees since no company would want to give American Shipbuilding Company any work if there was danger of a strike in the middle of lay up season.

That is my statement, and that is true, but it does not say what date—

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Q. (By Mr. Kossoff.) Do you recollect now when that statement was made?

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A. No, sir, I don't.

Q. Perhaps if I showed you a letter that was sent by yourself and direct your attention to the following paragraph, would it refresh your memory? A. Is this the paragraph, sir?

Trial Examiner: Keep your voice up, both of you, if you want part of this on the record and part off, or we'll be all mixed up.

The Witness: On July 31st, 1961, we submitted a proposal for a three year agreement and asked it be submitted to the membership. During these negotiations the Union through Mr. Alexander, asked if we would extend the agreement for six months, which would bring the expiration date to January 1st, 1962, during the lay up and repair season,

and we refused. He did not offer any extension on any particular terms, but since we were bargaining, this was only one of the proposals.

Mr. Kossoff: Thank you.

Trial Examiner: That is the letter you wrote to the Labor Board?

The Witness: This is a letter that I wrote to the National Labor Relations Board, dated November 15th, '61, which is not in affidavit form, and is a review of the events that occurred.

Q. (By Mr. Kossoff.) That is a true statement, is it not?

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A. As I believed it at that time.

Q. Do you believe it now to be true? A. I'm not sure whether it is or not.

Trial Examiner: I don't understand your answer.

The Witness: Well, Mr. Midnight told me that he had heard a discussion from the Union with reference to an extension of six months. I told Mr. Midnight I had never heard any such statement made by a union representative, and he said that his memory was that there was such a statement, and I asked him when that statement was made, and he said he didn't remember exactly but he said it was made sometime during our negotiations, and that is what I mean by my answers.

Trial Examiner: All right.

Q. (By Mr. Kossoff.) But did you check with Mr. Midnight before preparing the letter which you sent to the National Labor Relations Board, did you not? A. Only to the extent of asking him if he recalled any such conversation.

Q. Mr. Cavano, you referred to an August 9th meeting between the group of unions and the Respondent in which you said the Company decided to look over its problems and take some specific actions and decide to lay off employees in Toledo and Chicago, that it was a management made decision, and you were present when the decision was

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made. Why was the decision made to lay off these employees? A. The decision was made because it was the company's belief that when the negotiations broke off on August the 9th, 1961, that an impasse had been reached between the Company and the Unions and that it was necessary for the Company to decide what its future course of action should be in the light of what it believed to be an impasse.

CHARLES CAVANO:

Cross-Examination (By Mr. Mamet).

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Q. And haven't you already told Mr. Kossoff that you decided to lay them off because you couldn't get a contract?

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A. No, sir, that is not what I said.

Q. Oh, because you were at an impasse, I'm sorry. Now, how did the determination by you and your committee on August 10th to lay them off, thereupon (sic, bear upon) the fact that this would be called a labor dispute? A. Well, the company's determination was that this became a labor dispute on the night of August the 9th when the Company refused—when the Union refused to consider our proposal,

refused to take it back to its membership, did not make a counter offer, and did not suggest any other date of a meeting.

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Q. Was the meeting on the 8th of August subject to further call by Federal Mediation? A. I would have to look at my notes for August 8th. I'm looking at them now.

On August the 8th, I believe it was agreed that we would meet again on August the 9th.

Q. And what about August— A. That was not called by the conciliation. That was by agreement of the parties.

Q. And when you adjourned on August 9th, it was subject to recall by Federal Mediation; is that right? A. I'm not sure. All I know is that on August the 9th the meeting adjourned at about 12:30 in the morning, and I don't remember—that's possibly true, but I don't know for sure.

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Q. No strike occurred here in '61, did it? A. No, sir.

Q. The south Chicago yards involving this dispute, I don't know—Does the complaint make that clear, that it's the south Chicago unit?

Mr. Kossoff: (Indicating in the affirmative.)

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STANLEY A. MIDNIGHT was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Give the reporter your full name.

The Witness: My name is Stanley A. Midnight, M-i-d-n-i-g-h-t.

Direct Examination.

Q. (By Mr. Cavano) Where do you live, Mr. Midnight? A. I live at 17450 Edgewater Lrive in Lakewood, Ohio.

Q. Are you affiliated with the American Shipbuilding Company? A. Yes, I'm employed by the American Shipbuilding Company. I'm Executive Vice-President and Director.

Q. How long have you been an executive and vice-president? A. Since March of 1959.

Q. How long have you been affiliated with the company? A. I have been with the Company since October, 1936.

Q. In various capacities? A. Yes, sir.

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Q. Will you name some of them, please? A. Well, I started in as drafstman and became assistant chief draftsman and then chief draftsman and assistant to the vice-president of operations, vice-president of engineering, and then my present position of Executive Vice President.

Q. Where are the general offices of the Company situated? A. In Cleveland, Ohio. The address is Foot of West 54th Street.

Q. And generally speaking, will you tell us the policies of the Company with reference to its operations with the various yards with which it operates? A. Yes. We have our general offices located in Cleveland. It hulls the offices, the accounting department, our purchasing department, and engineering department. We have the floor plans which you enumerated in previous testimony.

Q. Do you have— A. Generally, in the securing of work, the manager contracts or obtains through the Cleveland office where our estimates are made through our engineering department through our estimating department, and we have a sales organization in Cleveland. The minor repair work most of the time is handled directly by our plants through the plant managers.

Q. And there are four plants, I believe?

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A. Yes, there have been four plants. One located in Buffalo, New York; one at Lorain, Ohio; one at Toledo, Ohio; and one in Chicago.

Q. And each one of these plants is supervised by a manager; is that correct? A. Yes.

Q. From your association with the Company, Mr. Midnight, are you able to give us the background of the company's bargaining history with reference to strikes in the past? A. Yes, sir. I was quite happy at the start of these negotiations when it was felt that this time we wanted to negotiate a contract and not have a strike.

Mr. Mamet: I'll object to the answer as being not responsive. It probably should be his objection.

Trial Examiner: I'll let the record stand. Mr. Alexander said essentially the same thing.

Mr. Mamet: I know that, but the question was, give us a history rather than how he may have felt emotionally.

Trial Examiner: I'll let the record stand. Ask him another question.

Q. (By Mr. Cavano.) Will you give us the background to the best of your knowledge with reference to the company's history with its association with the Union? A. Yes,

sir In 1952 we had contract negotiations and had a strike that ended in a contract. In 1953, negotiations

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again, and that ended in a strike. In 1955 we had a wage reopener and a two year contract, I believe it was, and we had a strike at that time before it was settled. In 1956 our contract expired and we had another strike before the contract was settled. In 1958 we had negotiations, again we had a strike. These strikes were all of two to three, four weeks duration, except the one in 1958, which I believe was ten weeks.

Q. Mr. Midnight, were you present at all of the negotiating sessions with the group of eight unions? A. Yes, sir.

Q. And you are familiar with the events that transpired at these various meetings? A. Yes, sir.

Q. Directing your attention to August the 9th, 1961, will you tell us what your best recollection is as to what occurred at the bargaining session with the group of eight unions on that day? A. Yes, sir. I believe we began negotiations on August the 8th and they continued on into the evening or night of August 9th, at which time we were unable to resolve our difficulties, and the meeting broke up with no further meetings being scheduled, without resolving our many of our differences, and, as I say, no further meetings were scheduled.

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Q. Was any counter offer made, as you can recall? A. There was no counter offer made by the Union.

Q. And what followed that meeting on August the 19th, '61, as far as you were concerned? A. As far as I was concerned, I called a meeting that night in our plant—four

our four plant managers, including the personnel managers that were present, and yourself and myself, to meet the following morning amongst ourselves to determine what course of action we were going to take. We had our men working—had men employed at all the plants. In our Lorain yard we had close to four hundred men working, and we had worked to be done there. At our other three plants there was practically no work. We reviewed the situation as to what the possibilities were going to be to get work, because I was concerned with the fact that we had three men employed and the payroll going on and not having any prospects for work. We had always maintained a nucleus crew primarily so that if a job showed up tomorrow we were able to do it, or if a job showed up the following day we were able to do it, and this was generally the pattern of things. We didn't keep a nucleus crew on for a month or so and doing maintenance work and not having any work. Almost every day we had some amount of work. Sometimes it was more than other times.

Now, however, the situation was different. We reviewed

the situation and we found that we had no possibility of any work in our Toledo, Chicago and Buffalo plants.

Q. How did you know this, Mr. Midnight? A. Well, from the newspaper reports that told of the dispute between our company and the union, the customers were continually calling me to ask me the status of our negotiations, were they coming to a head, was I expecting that they were going to be settled soon? Of course, I was unable to say when it would be settled, but at this time now with the break in negotiations, without any future date being set or any counter offers being made, I felt that we were just at a stalemate and that we couldn't continue on as we had been doing.

Q. Do you believe that any of your customers would have given you any work if it had been—if it had not been for the situation that you found yourself in on August 10th, '61? A. I'm sure that they wouldn't give us any work that would mean their bringing their ship into our plant. I would like to review a situation in 1955 where we had a ship in our dry dock prior to the expiration of our contract.

Q. What ship was it, Mr. Midnight? A. It was a Detroit Edison, and we had plenty of time to get it out before the contract ended, but we had a slow down by the riveters one day and the following day a walk out off the jobs before the expiration of the contract, and

this prevented us from finishing the job before the expiration of the contract, and then the start of the—after the expiration date, the rest of the yard walked out, and this customer was caught in our dry dock for a period of three weeks. This is a terrible serious thing to a customer, especially this ship was a new one and probably worth from eight to ten million dollars. He is only able to sail it during the summer season from April to December, and he had four months to make every possible day count and to have the ship tied up for three weeks, as it was, was a terrible blow to him, and, of course, the rest of the customers knew this too, and I think they all realized if they brought a ship into our dry dock or into our plant it was a real possibility of it being tied up in case there was a strike.

Q. Was that one of the motivations for your decision on August the 10th then, the fear of—the ~~fear of a possible~~ strike on the part of your membership?

Mr. Kossoff: Object, it's a leading question and the witness has already answered that question.

Trial Examiner: It is leading, and I want counsel to, on important matter, to try to refrain from leading, but I'll take the answer.

The Witness: I lost the question.

Trial Examiner: Ask another question.

Mr. Cavano: Would you read the question, please.

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Trial Examiner: Read it back.

(Pending question read by the reporter.)

The Witness: A. Yes, sir.

Q. (By Mr. Cavano.) What, if any acts, then did the company—What, if any decision then did the company make on August the 10th, 1961, as to its future operations? A. Well, on that morning, after discussing all these various aspects, we decided that it would be necessary to lay the people off where we did not have work for them to do. In Lorain we laid none off. We had close to four hundred people working there. We had work for them.

Q. Was there a ship at Lorain that the men were working on? A. Yes, we at that time were jumboizing one of the tankers into a large bulk ore carrier, and we had this work to do, and the ship was scheduled to complete in October, so there was no question, we continued to work on that.

Q. And did work continue then at Lorain in a normal fashion? A. And then work did continue. As we finished up towards the end—I think we delivered it on October 13th—we slowly laid off people until the ship left the yard.

Q. What was the situation at Buffalo on August the 10th, 1960? A. In Buffalo we had some miscellaneous work to do. We

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had a dredge there that we were going to have work to do this winter on, and we had some prefabricating and so forth to do on that ship—for that ship, and we were able to do some of that. In addition to that there were miscellaneous jobs around, the labor which we continued to take. In other words, we continued to take whatever work we could take and do.

Q. Work continued then in Buffalo? A. Work continued in Buffalo at a very reducing rate. They wouldn't give us very many jobs.

Q. What was the situation in Toledo? A. The situation in Toledo there was just tow work, and so we laid off practically the whole group.

Q. Were any employees retained at Toledo? A. We had at least two employees working full time. We were making some deck engines for stock, and we continued to work on those deck engines.

Q. You say that there was no work in Toledo to be done by the Company for any customers on the 10th of August with the exception of what you told us? A. To the best of my knowledge.

Q. And what was the situation in Chicago on August the 10th? A. Chicago we had just no work at all, period, and so it was necessary to lay everyone off. I think that, however, that during the time there were probably two occasions where

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we did call men back and do small jobs.

Q. That was at Chicago? A. Chicago, uh-huh. So that, as a result of the meetings those were the instructions that were discussed, and those were the instructions given to the yard managers and others in our company, that we were

continuing to take what ever work we could take and do, and I believe that those orders were carried out.

Q. Mr. Midnight, are you familiar at all, personally, with the Pioneer Challenger incident at all, are you familiar with that? A. Well, not too well, except that the owner said to me later on, he said, "It's too bad that we couldn't bring that job into you", and I agreed with him. Of course, I was talking with a good many of the owners all the time, because they constantly kept calling. In fact, on the Pioneer Challenger, the question was asked of me—I think we were meeting currently at the time that this Challenger was near Cleveland, and they have it outside of Cleveland waiting to hear whether we were reaching a settlement on our contract negotiations here, with the thought that if we have, they were going to bring the ship in to us, but I was not able to report a progress, so they took the ship elsewhere.

Q. Mr. Midnight, to the best of your knowledge, did the

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Company at any time refuse any work that was offered to it by ship owners? A. No, sir.

Q. Or by any of its customers? A. No, sir.

Q. Incidentally, about how many customers does the American Shipbuilding Company have in all, approximately? A. Well, off hand, that would be around fifteen to eighteen different companies that we do work for.

Q. Will you tell us generally the method by which orders are obtained, whether or not they are formal contracts in writing or just what method does the Shipbuilding industry follow with reference to its relations with its customers? A. Most of the so-called repair work is done over the phone by customer calling our yard manager, and he has had a grounding or he slips a dock or something, so the ship needs

to go into dry dock for repairs, and he calls—maybe he would like to go to our Lorain yard, and he will call our Lorain manager, and does he have a large dock opening, and could he take our ship, so the manager has it open, and he says yes, so the ship is taken in to dry dock and the damage surveyed so they will give the customer a price, and if it's agreeable to the owner, we proceed immediately, and generally he follows it up with a requisition at a little later date confirming the order, and this pricing

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that sometimes run into a rather large job. Sometimes it's not unusual at all to get a two or $300,000 job that is handled in just that manner. On the other hand, we do certain contract work which may involve lengthening a ship or repairing it, jumboizing it, converting to another type of ship, or something like that, where it involved a lot of engineering to come up with the requirements for doing this job, and so those engineering designs and plans are made and it's estimates, and we are both generally in competition with other ship yards. On the basis of those bids, some ship yard is awarded the work, and a formal contract is signed, and in those cases it usually includes a force majure clause that these other miscellaneous jobs don't carry.

Q. Generally, with the number of customers, you are reasonably well acquainted with each other, are you not? A. Oh, yes.

Q. Can you tell us or give us a general picture of the situation in the shipbuilding industry on the Great Lakes in the period 1960-1961? A. Yes. This I told to the Unions in our negotiations. With the opening of the St. Lawrence Seaway, it permits the bringing in of iron ore from foreign countries, and principally from Canada. New deposits of

iron ore has been found and has been developed near Labrador and considerable iron ore is being brought in from that area.

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Iron ore is also being brought in from Venezuela. In the case of the iron ore being brought in from Venezuela, the iron ore is being carried in Chinese ships, Japanese ships, Greek ships, in any kind of a ship. In other words, any flag ship can carry cargo between one country and another, and in the case of the iron ore from Canada, the same thing is true, but the Canadians are hauling most of that.

As a result, they are probably bringing in close to twenty million tons of iron ore now through the Seaway, which is reducing the amount of iron ore that is being brought down from the Duluth area, the Masabe Range area, and I would estimate that about eighty million tons per year may have been an average requirement for this day and age, so that of the seventy to eighty million tons, twenty million tons is being brought in through the Seaway. This, of course, reduces the requirements for the ships required to ship this iron ore, so that during the last two years, seventy-three ships on the Great Lakes have been scrapped, mostly all the smaller ones, because they are no longer economical to operate due to the foreign tonnage.

The Great Lakes rate for hauling iron ore has remained constant since 1957. For $2 a ton is the Lower Lakes rate, and so that these smaller ships are unable to compete any longer, and they are being scrapped.

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Well, last year when the time of our—starting our negotiations, all the ships that were left after the scraping of the seventy-two, and this is seventy-two out of about three hundred and fifty ships total, there were still only 62 per

cent of the available ships still sailing and available for use that were in use. So, that, with the ships that were scrapped and only 62 per cent of the ships being used to require any repairs, it has greatly reduced the work of the Great Lakes shipbuilders, and as a result of that, one of the shipbuilders, Great Lakes Engineering Works, who has yards at River Rouge, Michigan, they are currently liquidating and going out of business. So that, the outlook for the shipbuilding and ship repair work on the Great Lakes is certainly quite serious.

Q. This then had an impact upon your negotiations in 1961 with the Unions, did it not? A. It sure did, and in addition to that, previous to the bad times, shall we call it, there seemed to be enough work to do around, and while we were paying considerable higher wages, it seemed that if we would sit back and let the other yards get filled up that then we could finally get a job that we could take at a little higher price, but not with the reduced amount of work. It is our fear, and I think it is being brought out, that there would not be enough to go around, so that the yards with the lower rates,

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they are going to get the job and there would be none left for the higher priced ones. This is true, this poor man to work crisis, of most of the so-called contract work.

Q. Is this based on competitive conditions of the industry? A. Based on competitive conditions, that's right.

Q. Directing your attention to August the 1st, 1961, Mr. Midnight, and subsequent thereto, will you tell us what your best recollection is with reference to the negotiations with the group of eight, with particular reference to the question of an extension of the agreement? A. Yes. I don't remember just what time, but I felt that there was one

time in our negotiations, and I might say that I didn't keep complete notes because others were keeping notes, but it's my recollection that our mediator had asked us near the end of one of our meetings if we would extend the present contract for six months, and our immediate answer was no, because as I explained before, the ships are sailing for eight months of the year and the other four months they cannot sail into the ice condition on the lakes, so that every possible repair that could be put off until the winter season is put off and the customer then schedules his ships for dry docking and repairs during winter season, and we were to have a contract negotiation come up the 1st of February or sometime during this winter season, the customers would be fully aware of that and would not bring their ships in to

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us for that winter knowing that we were liable to have a strike and probably would have one for the last five years, and so therefore he would take his ships elsewhere and it would hurt not only the American Shipbuilding Company in getting the work, but it would be no work for our employees.

This I have talked to several of the customers about, just to ask them that question, whether this would make any question, and their reply was it certainly would. "We wouldn't bring it in to you unless we couldn't find anywhere else to take it."

Q. Was there any conversation that you can recall with reference to extending the contract on a day to day basis on August the 1st, 1961? A. Yes. When we made our final proposal that morning of August 1st, or the night of July 31st, they asked us to extend the contract, and we said as long as they were going to take their proposal back to their membership we would continue the contract on a verbal

promise and continue to observe the terms of the contract until we had their answer.

Q. Mr. Midnight, do you recall any conversation at any of those meetings to the effect that you were bidding on some business that you had gotten and that it was important for the company to negotiate a contract as quickly as possible so that you could start on the work? A. No, sir, I never made such statements, and we had no

bids to prepare, and we were not bidding on anything. There were—There was one bid that was put in, I believe it was around February or March, for four lake freighters, and I believe it could be this that someone was referring to, and to this date yet, that contract has not been left for the four lake freighters. In fact, the last I talked to the customer, it looked like he was going to build them in Canada, but other than that, I—We had no other contracts that we were bidding on.

Q. Are you working on any new contracts since October 7th, that is, are there any new contracts at all that are being worked on at any of your yards at the present time? A. No. We have no new construction in the plants at all.

Q. Or any conversion work, converting the ships to other uses? A. No. It's almost just general repair work for this winter, which is a very reduced volume of work.

Q. Is there very much work going on in the Chicago yard at this time, Mr. Midnight? A. I can't exactly remember what the figure is as to the number of men working, but I think it's around fifty.

Mr. Mamet: How many?

Trial Examiner: Fifty.

Mr. Mamet: Fifty.

The Witness: But I do know that we have no work, and

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the work that we do do, Mr. Dalrymple is trying to stretch it out so we can at least keep those fifty men working instead of financing and having nothing to do, he is spreading it out so it will be at least continuous work for this winter which should be our busy time for this many men.

Q. And what is the situation in Lorain at the present time with reference to work? A. We have only repair work in Lorain and we have 270, 300 men working in the Lorain plant.

Q. What is your normal compliment of workers in the Lorain area? A. To break even we should have six to eight hundred.

Q. What is your present situation in Buffalo at the present time? A. Buffalo has a small amount of work, not up to what we generally have. They have one dredge that they are doing miscellaneous repairs on and then there is miscellaneous docking, and I think we are running out of docking.

Q. What is the situation at Toledo at the present time? A. Toledo is probably the best off of our four yards, and we have a fairly good volume of repair work, ships repair work. In addition to that, the company has been trying to diversify, to get some other work in to the plant, and we have taken a job to fabricate about a thousand tons of steel for the sintering plants up at Silver Plant.

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Q. And this is not ship repair work? A. Sintering, it's a process of upgrading the iron ore. Take iron ore of low content, 30 to 40 per cent iron, and take the rock and the impurities and so forth out of it and make it in little pellets

and come up with an ore that is around 55 per cent iron. This is hurting the shipping too, because—

Trial Examiner: By rail?

The Witness: Shipping by rail, and also when they haul a ton of iron ore down with 30 per cent iron you have to haul two tons to get as much iron as you do to get with one ton of 60 per cent of iron ore, so this is reducing the requirements of the lake ships.

Q. (By Mr. Cavano.) Directing your attention to August the 1st, '61, Mr. Midnight, do you have any recollection as to any discussions as to continuing the contract on a day to day basis after that time?

A. Only up until we got our answer on August 8th, I think it was, where we continued it until the Union had taken our proposals back to the membership and came back with their answers on August 8th, I think, and we continued on a day to day basis during that time.

Mr. Cavano: No other questions.

Trial Examiner: Cross examination.

STANLEY A. MIDNIGHT:

Cross-Examination.

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Q. (By Mr. Kossoff.) You attended all the negotiating sessions according to your testimony; is that correct? A. Yes, sir.

Q. Now, in a number of these meetings after July 19th, when the Federal Mediation came in, were scheduled by Federal Mediation; is that correct? A. Well, I heard that discussed here. At one time I talked to Mr. Seldin, and he told me that he scheduled a meeting only when someone requested it. In other words, someone had to tell him we

would like to have a meeting, otherwise he said he just wouldn't call a meeting. That is my understanding of it.

Q. And if he didn't schedule the meeting, how was the meeting scheduled? A. We have to wait until one or the other side would request a meeting.

Q. I see. After August 9th then, someone did request a meeting; is that correct, after August 8th and August 9th, someone requested a meeting; is that right? A. Yes.

Q. And who requested the meeting? A. I can't remember in all the instances, but I think we did in almost every instance. I know I did personally at least two times.

Q. Did you get any calls from Chicago from any customers?

A. No.

Q. Did you get any calls from Toledo? A. Well, of course, most of our customer's representatives are in Cleveland, so you wouldn't be very liable to get a call from Toledo or Chicago.

Q. And you didn't get one from Buffalo either?

Mr. Cavano: Excuse me, Mr. Midnight, would you speak up a little.

Q. (By Mr. Kossoff.) You didn't get any calls from Buffalo either, did you? A. No, sir.

Q. And isn't it a fact, if anyone had needed a repair job, they would call the manager of the local yards? A. Generally speaking, yes.

Q. That is correct, so you had no way of knowing what the situation was as far as repairs in these various yards; is that correct? A. No, I would not say that. I was in constant touch with the customers. In other words, I was spending time at lunch with them, perhaps we were spending

time at naval architects meetings or some such thing as that and we had general discussions, but they did not call me in a particular problem for work.

Q. And if there was an emergency repair required during the summer months, the job had to be done in a hurry so they

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can continue working at full pace? A. Yes, sir.

Q. And they wouldn't call you if an emergency repair was necessary, they would call the yards directly? A. Generally speaking, they would call the yard. There would be times when they might call me if they couldn't get ahold of someone or a dock was filled or he was trying to use some influence to get his ship in, I might be called.

Q. Now, which customers, if any, from Cleveland, called you? A. You mean about putting a ship in our dry dock or something?

Q. No, about your labor negotiations, how they were going. A. Well, there was Mr. Steinbrenner, there was Mr.—

Q. When did Mr. Steinbrenner call you? A. I don't remember, and I wouldn't say that these people called purposely to ask. They might be just talking to you on something else, but I think some did call purposely for that.

Q. Can you recall anyone that called purposely to ask that? A. No, I can't think of anyone, but I would say—

Q. Well, if you can't think of anyone, that was the question, Mr. Midnight.

Is it not a fact, Mr. Midnight, that between August 11th and October 4th, 1961, there was not a single employee who

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worked at the Chicago yard? A. A single employee in our Chicago yards?

Q. That's right, other than a foreman or a supervisor? A. I would say that is not right. We had a watchman working and we called men in a couple times. I can't remember whether that was after October 4th or not.

Q. Yes, I believe that was. A. The storekeeper is working some of the time.

Q. I'm speaking of employees in the unit in the group of eight unions? Is it true that there was not one employee in the group of eight unions that worked at the Chicago yards between August 11th, 1961 and October 4th, 1961? A. I do not know.

Mr. Kossoff: Well, could we get a stipulation to that effect?

Mr. Cavano: I think if you referred to the daily labor reports, you have your answer.

Mr. Kossoff: Do they cover every day between August 11th and October 4th?

Mr. Cavano: I don't know.

Mr. Trial Examiner: It could, there are only fifteen of them.

Mr. Cavano: I don't recall now, but I think it is in the evidence.

Mr. Kossoff: I don't think that particular point is.

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Mr. Dalrymple, are you aware of that?

Trial Examiner: Let's go off the record.

(Discussion off the record.)

Trial Examiner: On the Record.

Mr. Kossoff: I would propose the following stipulation, that between August 12th, 1961 and October 27th, 1961, there were no employees from the bargaining unit as encompassed

in the contract between the group of eight units and the Respondent, except for the following employees for these which I have named and for the amount of hours which I will name. On September 25th, 1961—On September 25th, 1961, employee John Piltaver, was called for—three employees, employee John Piltaver, employee Millard Cox and also employee John Salaker, were each called to work on maintenance on a Man-to-ich, Manitowoc crane.

Trial Examiner: Manitowoc. You are from around this country?

Mr. Kossoff: I have never been there.

The first employee named worked for four and a half hours, and the other two each worked five hours on that day.

Mr. Dalrymple: That was—the crane was tied down. I had to get a crane lift to lift it from below.

Mr. Cavano: Why don't you introduce this into evidence as your Exhibit, and I'll agree to it.

Trial Examiner: Well, will you agree that during the

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dates he mentioned no employees in the bargaining units involved in this case worked except for the information listed on the paper?

Mr. Cavano: Except for the information listed on the paper, which I believe he will now introduce as an Exhibit.

Mr. Kossoff: GC-9 please.

(The document above-referred to was marked General Counsel's Exhibit No. 9 for identification.)

Trial Examiner: General Counsel's Exhibit 9 is admitted in evidence to go along with the stipulation just noted.

(The document above-referred to, heretofore marked General Counsel's Exhibit No. 9, was received in evidence.)

Q. (By Mr. Kossoff.) Now, Mr. Midnight, is it not a fact that employees at Buffalo continued working after August 11th in the following numbers until they were laid off by your company; namely, during the week ending August 16th, 1961, twenty-two employees in the bargaining unit worked at Buffalo; the week ending August 23rd, twenty-four employees from the—

Trial Examiner: Wait a minute, I don't want to interrupt you. If you are going to go through all those things, I don't know what kind of an answer you are going to

get from the witness.

Mr. Kossoff: Should we try and stipulate on that, too?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Midnight.) Mr. Midnight, are you familiar with whether or not between August—the week ending August 9th, 1961, and the week ending September 20th, 1961, during each of those weeks, an excess of 220 employees was working at the Lorain Plant, at the Lorain yards, on each one of those weeks? A. That was to September 19th, did you say?

Q. Through the week ending September 20th. A. Well, I'm not sure, but I think that statement would be correct.

Q. And is it not also correct that it was not until the week after October 4th, 1961, that the number went down below 150 at Lorain? A. I'm not able to keep all these figures and employment of every day in every one of our yards in mind, but I'll say this, that sometime possibly in the latter part of August, the first part of September, I think we reached the peak of our employment on that job, and

from there, we gradually tapered off until October 13th when we finished the job, and it was probably down pretty close to zero.

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Q. And did the men at Lorain ever walk off the job? A. No.

Q. Did the men at Buffalo ever walk off the job? A. The time now between the period of August 1st and October—

Q. The time the contract was signed? A. No.

Q. And did the men at Toledo ever walk off the job? A. No.

Q. And there were no men in Chicago to walk off. You used the term "force majure clause" when you were speaking of your contract. What did you mean by that? A. It's a terminology of a clause in a contract in which a contractor is excused from late delivery for various reasons, such as, non-receipt of material, a strike, act of God, terrific unusual weather, such as strong storm, a storm, tornado, all such things as that where it's generally assumed to be things which the contractor has no control over.

Q. And all contracts handled through Cleveland had force majure clauses? A. You say do they?

Q. Yes. A. No.

Q. Did you testify that the contracts that were handled

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through Cleveland did contain such clauses? A. I think they generally have them, usually have them, and I would say that it's generally the case. There are probably some few that don't.

Q. And all big jobs are handled through Cleveland? A. A. There are some few that are handled in the yards.

Q. Were there some big jobs handled in the yards that had force majure clauses? A. Well, if there is any large job we always try to get a force majure clause in there, yes, It isn't only a question if we want to get one in or not. Sometimes a customer doesn't want one in, and sometimes he will go along with one, but generally we like to get one in all of our contracts of that type.

Q. Now, you talked about the condition of the Great Lakes and iron ore and some other things. This is something that didn't develop overnight, this has been in existence over eighteen months, isn't that true, certainly over a year, the condition on the Great Lakes as it exists now? A. No, I would say it had been gradually getting worse. This didn't develop all at once.

Q. I didn't say it developed. A. It has been developing ever since the Seaway opened.

Q. And when did the Seaway open? A. I think it was in the spring of '59.

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Q. I see. Now, you mentioned about a company that was going out of business. That actually would increase your business, wouldn't it? A. Yes, that would help.

Q. Now, isn't it not a fact that few shipbuilding companies on the Great Lakes have dry dock facilities big enough to handle large boats? A. You say are there just a few?

Q. Yes. A. Yes, I would say there are just a few. The largest dry dock on the Great Lakes is owned by Fraser-Nelson, at Superior, Wisconsin.

Q. And I assume also when you say the Great Lakes you mean on the American side? A. On the American side, all right. The largest dry dock, shall we say on the Great

Lakes is on Port Weller which is on Lake Erie, and Manitowoc has a large dry dock. Sturgeon Bay has a dry dock, and then at the American Ship Yards, that's primarily—

Q. Now, you referred to an August 1st conversation at the negotiating session, Mr. Midnight, in which you said that the Union asked to extend the contract, and you replied that as long as you were—as long as they would take back your proposal to labor, to the employees, to membership, to vote on it, you would continue to observe

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the contract until you had an answer; is that correct? A. Yes, sir.

Q. But you did not say you would continue to observe it after there was an answer, did you? A. No.

Q. And you did not say you would extend it after there was an answer, did you? A. No, sir. It was understood that it would be on a day to day basis, and we would continue until we had an answer from them.

Q. Now, you said that during August to October, 1961, at least you didn't bid on any jobs. You don't mean that you weren't asked to bid on a job, do you? A. If we didn't bid on any, then we weren't asked to bid on any.

Q. Weren't you asked to bid on the U. S. S. Prescott? A. I'm not familiar with what that job did.

Q. That was a navy job? A. What did the job consist of?

Q. It consisted of doing various work to the Prescott. Mr. Stafford talked about that. A. Was that a Coast Guard—

Q. No, Navy. I guess you are not familiar with all the ships? A. No, I don't get in on all of them. I have plenty

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of things to do.

Trial Examiner: Do you have anything else?

Mr. Kossoff: Nothing more for me.

Mr. Mamet: Just a few questions here.

STANLEY A. MIDNIGHT:

Cross-Examination.

Q. (By Mr. Mamet.) How long did you say you were with the company, Mr. Midnight? A. Since October, 1936.

Q. Well, would you be familiar with the operations in the south Chicago yards since that date to the present date? A. Well, of course, when I started you must understand I was just a draftsman and I knew very little about our operations in the various plants, and it wasn't until about 1950 that I got very familiar with the operations of the plant. In other words, I was in the engineering department up until 1950.

Q. Didn't you work in South Chicago at one time? A. I was living in Cleveland at the time.

Q. But working in South Chicago? A. Yes.

Q. As a naval architect? A. No, that was when I made assistant to the vice-president of operations, and I was coming up to Chicago on Sunday nights and going back to Cleveland on Friday nights.

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Q. In any event, you would have been familiar with the lay off that would have occurred in South Chicago, if it occurred, since the time you have been with the Company? A. I would say since 1950.

Q. Now, then, at least from 1950, until the present date, and this period from August 11th until October 27th, have you ever been in a complete shut down in South Chicago of this kind? A. Oh, yes.

Q. By the company as distinguished from—Pardon me. A. It was by the Union.

Q. But the company had never done that before? A. Not that I know of, no. Well, yes, maybe I should say yes. I think at the time we had strikes at some of the other plants and we didn't go out on strike in the Chicago yard. We closed them down.

Q. So that, if any of the plants struck and another one did not go out, you would follow the practice of closing them down; is that right? A. Yes, sir.

Q. As a matter of fact, if different unions at the same plant struck, one union struck and the other didn't and wanted to go to work, you might not even let that one union go to work?

Mr. Cavano: I object to that. I think it's speculative.

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Mr. Mamet: Let's find out if this did occur.

Trial Examiner: The objection is sustained.

Q. (By Mr. Mamet.) It did occur in Chicago? A. Not to my knowledge. It has never occurred in my company to my knowledge.

Q. Are you familiar with the strike in 1958? A. Yes, sir.

Q. You participated in the 1958 wage negotiations, did you not? A. No, sir.

Q. But you are familiar with the strike? A. Fairly familiar with what happened.

Q. The contract in 1958 expired on August 1st, did it not? A. Yes, sir.

Q. And when did Lorain go out? A. Well, I don't remember those dates.

Q. When did Chicago go out? A. I couldn't tell you that either.

Q. Did Chicago go out after Lorain? A. I don't know.

Q. What was the date of the settlement with the Boilermakers in the 1958 strike? A. Well, it was in October sometime. I can't remember the exact date.

Q. Well, in an attempt to refresh your memory, is it not true it was in September with the Boilermakers?

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A. Yes, I think it was in September with the Boilermakers, that's right.

Q. Isn't it true that the Toledo yard went out on strike on August 3rd, 1958, but Chicago did not go out until two weeks later because there were ships that it wanted to finish and get out for you; isn't that true? A. I don't know, sir.

Q. It's possible that it is true, though, you have no independent knowledge? A. I think it is possible, yes.

Q. Isn't it true that while Chicago went out two weeks after Toledo, that the over-all strike with the Boilermakers was settled on or about September 16th? A. I really don't remember the date.

Q. Isn't it true that thereafter the Machinists went out on strike? A. Yes, Machinists did not settle. In other words, as I understood it, the Boilermakers settled their contract and the Machinists had not, and so that after the contract was negotiated with the Boilermakers, the Machinists weren't willing to sign, and so the strike continued for a period of time.

Q. Whose strike, the Machinists strike? A. The Machinists strike, and the Boilermakers would not cross the line of the Machinists.

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Q. Isn't it true that the Boilermakers attempted to go to work, and you wouldn't let them? A. No.

Q. But it's possible, in Chicago? A. No. I don't think they would cross the picket lines of the Machinists.

Q. You know that? A. I'm pretty sure of it.

Q. That's the best that you can say, is that you are pretty sure; is that right? A. Yes, sir.

Q. It probably will be difficult to understand some of the words here. You said to the Unions, Boilermakers, in August of 1961, that you would continue the contract on a stand by basis if they took the proposal back to the members? A. While they were taking it back to the membership we would continue it on a day to day basis, yes, we did.

Q. Now, they took it back to the membership? A. Yes, sir.

Q. So, they were satisfied what you asked them to do; did they not take the August proposal back to the membership? A. Yes, sir.

Q. You mailed it to the membership or handed it out in taverns; isn't that true? A. I would say what we did, we sent the letter to Mr.

Grambo in Chicago, and he said, "I don't know who belongs to the Union in Chicago. How should I know who to distribute these to." Well, someone up in Chicago made the statement to me, so we sent the thing out to the employees.

Q. Isn't it a matter of fact, they did arrive in Chicago even before the people returned from the negotiations? A. I don't think so.

Q. But they were distributed by your foreman to the people? A. Yes.

Q. And thereafter—In many cases, they were? A. In many cases they were.

Q. And even sometimes they were distributed to the taverns, these little hangouts outside the yards; isn't that right? A. No, I don't think we took any to the taverns. Not that I know.

Q. But you told your foreman "that get these out as soon as you can right now?" A. I don't know what he was told in the yard. All I know is that the men weren't getting them and we attempted to get them out.

Q. You wanted your last proposal to the Union accepted, of course? A. Yes.

Q. You thought it was a good proposal?

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A. Yes.

Trial Examiner: Nobody has alleged that the company advising the employees of its offer or last offer is an unfair labor practice, and I don't see why we are spending so much time on it.

Mr. Mamet: I'm leaving the point.

Trial Examiner: I should have spoken up earlier.

Mr. Mamet: That I was leaving.

Trial Examiner: Go ahead.

Q. (By Mr. Mamet.) Now, you wanted this offer accepted. I think that is where we were: is that right? A. Yes, sir.

Q. And pending this—the process that the unions have to go through to have it accepted or rejected, you were ready to keep going on a standby basis for a little time to see what was developing; is that right? A. Well, we understood that some of them had meetings on Tuesday and some had

meetings on Wednesday, and some on Thursday; some of them didn't have a meeting that week, and so it was going to take maybe a week or ten days before they would all get their meetings in. Some had to arrange for a hall, rent a hall, to get a meeting place, so it would have taken a little time.

Q. What would have happened if they would have accepted then the contract would have been in effect and there would

have been no lay off; is that right, is that what would have happened if they accepted your offer? A. If they would have accepted our offer, it would depend if we get work. I think we would have got work then. The customers were refusing to bring it in to us, and we probably would have received work and no one would have been laid off.

Q. But you wouldn't have shut down the Chicago yard if there had been a collective bargaining agreement in effect, would you? A. We wouldn't if we would have got work.

Q. There is always work in a yard, isn't there? A. I think we have to face it now, it's a point that I tried to bring out before, that times are changing.

Q. I understand that. A. There is less work.

Q. There is always maintenance work, is there not? A. No, no.

Q. Many times Mr. Dalrymple the summer before that had people going around fixing window sills and painting a sign out in front, and that is not what we call maintenance work. Maybe you want to call it maintenance work, if you want to, but actually we were just keeping the people and trying to find something for them to do.

Q. You mean, it's possible then for you to shut down any

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of these yards, absent a labor dispute or anything, you just shut them down? A. It would be possible.

Q. Is that what you are saying? A. I'm saying it might come to that.

Q. But it hasn't come to that? A. No.

Q. It hadn't come to that in August of '61? A. No.

Q. So, if you had a collective bargaining agreement with the Union, you would not have shut down the Chicago yard in August of '61? A. I can't say we wouldn't have. I don't think we would have, but again, as I say, if we didn't have the work we would not continue it. The only reason we continued a nucleus crew in the summer time is because sometimes when we get a job we need ten men and the next day fifteen men, and if time goes on and there is no work, no, we are not going to continue the nucleus crew and the so-called maintenance that you are talking about, trying to keep these men busy, not with the things that you are talking about.

Q. Well, generally, you may lose money during the summer? A. Generally, it's almost always that we do.

Q. Yet, in all these summers you kept people around, isn't that true?

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A. Yes, sir.

Q. Now, explain for the record here, why do you keep the people around? A. That's a funny question. To do the work, to do the repair work.

Q Did you hear Mr. Dalrymple also testify here yesterday? A. Yes.

Q. Mr. Dalrymple said we have to maintain these people around for work which may come in on an emergency basis and to satisfy customers and for good will, because if we didn't service them and don't service them during the summer, we are not going to get them then during the winter; isn't that right? A. That's essentially true, that if all the ship yards shut down during the summer time and there are no men on call, who is going to fix it?

Q. Who is, American Ships, right? A. Well, any of the companies that have been on, and most all of them do try to maintain a nucleus crew.

Q. The only thing I wanted from you, Mr. Midnight, and I think it's true, if you had a contract you would have maintained a nucleus crew in South Chicago in the summer of 1961; isn't that right? A. Again, I'll answer the same as I answered before, if we would have had the work, we would have maintained a

nucleus crew, but without the work and without the prospect of work, we couldn't afford to maintain a nucleus crew without anything to do.

Trial Examiner: Let's move on, Mr. Mamet, there hasn't been an objection, but you are covering substantially the things that General Counsel covered, and I think you have had a fair crack on it, and I wish you would hurry along.

Mr. Cavano: I wanted to give him all the opportunity to get the answers he was seeking.

Trial Examiner: I understand.

Q. (By Mr. Mamet.) Now, you stated that you know these people pretty well, the ship owners? A. Yes, sir.

Q Did they know that your Lorain yard was operating? A. Yes, sir.

Q. And they watched that and saw there was no strike? A. Yes, sir.

Q. They saw the work getting out, and they were aware of that? A. Yes, sir.

Q. Are you telling us that they didn't want to put their work in line when they saw your yards operating and the work getting out and no strike? A. Yes, sir.

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Q. Now, the position then was that if you didn't have a collective bargaining agreement, they wouldn't put a ship in? A. That is essentially it. In other words, the ship that was in the yard being repaired them, there was nothing to be done about it. It was there and had to be fixed, but here is a man that could sail his ship, and was he going to bring it into our dry dock for repairs with a possibility that there would be a strike, and he would lose the service of it the rest of the year? The other fellow couldn't help it, his ship was there and had been there for six months, nine months.

Q. You would have liked to have taken this business, wouldn't you? A. We sure would. In fact, we asked—we thought possibly there was a chance the contract was going to be settled and we talked to the Pioneer Steamship people, and they had the ship, as I understand it, outside of Cleveland for an hour waiting our answer to see if we felt this thing was going to be concluded.

Q. What date was that? A. You got me on dates, but I would say it was—

Q. If you could demonstrate to these people that you had a signed bargaining agreement, they would have relied on

that; isn't that right? A. If we would have a signed agreement, yes.

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Q. Did you ever ask the Union for assurance that any work that came in would get out? A. No, we didn't.

Q. Did you ever ask the Union to extend the agreement for any period of time? A. For one year.

Q. Well, you wanted a one year contract, didn't you? A. Well, to extend it for one year, yes.

Q. But apart from that, did you ever ask for an extension? A. No.

Q. Did you ever ask— A. We didn't want an extension, because it would take us into the winter season, see. We didn't want any extension beyond August 1st, because we got too close to the winter season with our contract dates.

Q. Now, when Alexander said to you, "Will you extend this contract until we reach an agreement and continue negotiating", what was your reply? A. No.

Mr. Mamet: No further questions.

Trial Examiner: Any redirect?

STANLEY A. MIDNIGHT:

Redirect Examination.

Q. (By Mr. Cavano.) Mr. Midnight, did you expect a strike of the group of eight unions in July and August of 1961? A. We thought that it was very possible we were going to

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have a strike, yes, sir. In fact, after our final meeting with Mr. Seldin, who is the Federal Mediator, I asked him what he thought the Union was going to do, whether they were going to strike or not. Well, it had been said that the Union did not want to strike. I, throughout the whole ne-

gotiations, never heard anyone say that they would not strike.

* * * * *

STANLEY A. MIDNIGHT:

Recross Examination.

Q. (By Mr. Kossoff.) Isn't it a fact, Mr. Midnight, that all repairs are not done in the dry dock? A. That's right.

Q. Many times the men leave it to go to the river to where it should be tied up for minor repairs; isn't that right? A. Yes, sir.

Q. And not quite common for emergency repairs that must be done out of the dry dock; isn't that right? A. Emergency repairs?

Q. Right? A. No, sir, emergency repairs are required to be done in the dry dock, too.

Q. I see, but are there any emergency repairs done out of the dry dock?

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A. Oh, yes.

Trial Examiner: It would depend upon the nature of damage?

The Witness: Yes. If the pump failed to work or something.

Mr. Kossoff: All right, no further questions.

STANLEY A. MIDNIGHT:

Redirect Examination.

Q. (By Mr. Cavano.) Wouldn't there be an emergency repair job out on the lake, for example, where you might have to send someone from your yard to fix it? A. Yes. The steering gear could go wrong or something.

Q. That could be just as much of an emergency as anything else, couldn't it? A. Yes, sir.

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* * * * *

JERRY W. THOMAN was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

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Trial Examiner: What is your full name?

The Witness: Jerry W. Thoman, T-h-o-m-a-n.

Direct Examination.

Q. (By Mr. Cavano.) Where do you live, Mr. Thoman? A. I live in Buffalo, New York.

Q. What address? A. 9C Campbell Road, Buffalo 5, New York.

Q. You are affiliated with the American Shipbuilding Company? A. Yes.

Q. In what capacity? A. Manager of the Buffalo yard.

Q. How long have you been manager of the Buffalo yard? A. Slightly over four years.

Q. Does that represent your entire period of time with the American Shipbuilding Company? A. It does.

Q. Were you present at the negotiations between the Company and the group of eight unions on August the 8th and August the 9th, 1961? A. Yes, sir.

Q. Will you tell us what your recollection is as to what occurred on the 9th of August, the night of August the 9th, 1961? A. As I remember, I think you are referring to the meeting

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that the managers had?

Q. No, the meeting with the Union the day before, August 9th, the night of the 9th. A. The night of the 9th, that is the night, as I remember, that the meeting was adjourned after there was an apparent stalemate between the two negotiating teams. The meeting broke up after neither one could see fit to proceed with any of the parts at issue.

Q. Was there then a meeting the next day between the managers, including yourself? A. Yes, there was a meeting out at the main office of the Company attended by, as I remember, the managers of the four yards, yourself, and Mr. Midnight.

Q Were you then asked to explain the work situation at the Buffalo yard at that time? A. I was.

Q. Will you tell us now what was the situation at Buffalo on that day with reference to how many people you had working and what they were working on and so forth? A. Oh, I had, at that time, what we consider to be a summer nucleus crew, and the work situation was one that they gave us no prospect of any reasonable amount of work which would maintain this nucleus crew over the summer months. Now, ordinarily, we maintain a service organization. We maintain a nucleus crew to help with any disaster situation

or repair situation that might arise on the water, and during the interim between jobs we do a certain amount of maintenance work. However, in this particular instance, the fact that we had no prospects of additional work, that is, large jobs that would give us any reasonable revenue, we couldn't see fit to maintain the nucleus crew and for the purpose of maintaining the plant equipment, because to hire men solely for maintenance purposes it's just beyond the means of the company, that is, the financial means of the company.

So, it's our past history, and by necessity, we have to maintain our equipment, our plant breakdowns, and what have you, as a fill in job between productive work.

Q. What then was the situation on August 10th as to whether or not this nucleus crew was to be maintained for further employment? A. It was decided that unless I could justify their employment by repair work, that I would have to let them go, and as a result we made every attempt possible to get work in the yard. We solicited from various owners around the harbor. I was contacted by a scrap dealer who had purchased a scrap vessel. He wanted me to give him an estimate on making the ship seaworthy for over the sea, and I quoted the job and was given the job until he found out that we had no labor contract, and he had a deadline to make in order to get his vessel out before the closing of the Seaway, so

we couldn't take the chance of putting a crew on board his vessel with the possibility of holding it up and him losing his deadline.

Q. So— A. So, as a result, he prevailed upon me to get another contractor, that is, one of our competition in the Buffalo area to do the job for the price—in the same neighborhood that I had quoted, and then there were other vessels that were—we had anticipated dry docking during this period. One of—One was the automobile carrier Ingalls and the Mataafa, both owned and operated by the McCarthy Steamship Company. The Mataafa was in for—she had a mandatory five year inspection on her by the Coast Guard and she had to dry dock in order for them to repaint her ticket. So, the owner's representative, Frank Jordan, in Buffalo, contacted me once and twice a week during the period that they were getting ready to dry dock

her, and he kept in close contact with me in regards to our labor contract, so finally, when the—during the change over period in the automobile industry when they had to tie their boats up, that was a period when they had anticipated dry docking both of these vessels. They had to make a decision. They decided to take the Mataafa to Canada for repair. They took it over to Fort Weller and the Ingalls the Coast Guard requirements did not specify that she be dry docked before the end of the up-rating season, so they permitted the owner to operate the

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Ingalls until the operating season. So, of course, when—since that time we have negotiated a new contract and put her in dry dock and just took her out of the dry dock about four, five weeks ago.

Another owner had a vessel in the Buffalo area which had quite a heavy Coast Guard Requirement and repair requirement on her.

Q. What was the name of that ship? A. The name of that vessel was the Drekenmiller owned by Bolland and Cornelius. They had contacted us early in the summer and requested that we schedule her for the dry dock at such time as they would need her prior to the operating—prior to putting her into operation. Well, just around the time—around the last week in July they had need for that vessel and they contacted us and wanted to know what the labor situation was, whether we had a contract. This company, incidentally, is one that was hung some years prior to that when they had a vessel in one of our other yards and had it held up for a number of weeks due to a strike in the yard. Of course, that company wasn't going to take any chances. So, when we were not able to tell him that we had a contract, they made arrangements to take

that vessel up to the hither Lakes to be repaired in one of our competitor's yards, and that vessel alone we know that from the work that we had surveyed on her that there was

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more than $100,000 worth of work on her, and I was told by one of the surveyors afterwards that she had a considerable additional work over and above the survey that we made in Buffalo, which ran the vessel up to close to $200,000 worth of work.

Q. What ship yard got that job? A. I think it was Fraser-Nelson.

Q. During this period, commencing August 1st and after, did you continue to have men working in the Buffalo yard on various jobs? A. Yes, we had—as I remember, in early August we had, including men on vacation and men absent due to sickness, I think we had in the neighborhood of fifty-two to fifty-five men, and we maintained them for a short period after we had our meeting, and then they gradually dropped off and, however, as the work—as we were able to get work, that is, small jobs, these jobs incidentally in the normal run of work are considered to be peanuts, they won't maintain our payroll, but nevertheless anything was better than nothing at the time to defray the cost. So, we took everything we could get, and as it worked, between deals, we had to lay the men off to the point where we didn't have any of the bargaining unit in the yard for several days at a time, and then maybe we would get a job requiring maybe two men, four, five men, nine men, maybe two men again, and that is

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the way it went until the time just prior to the signing of the contract. I think we had a few jobs that required four-

teen or fifteen men shortly before the signing of the contract, after which we, of course, pulled the men in as fast as we could, because we were able to take the work and could anticipate work.

Q. This work that was done at the yard between August 1st and the 1st of October, would that be the kind of work that would involve the ship owner in the event there was a strike? A. No. The work that we were doing during this period was work that would not make a vessel unseaworthy. This dealt mainly—well, some of the jobs were repairs to deck winches, installing rain lugs, repairing bulk heads. I think we moored a few vessels and unmoored a few vessels, and we changed some anchors. We repaired anchor chains, and all these jobs were jobs of such a nature that if there was a walk out or a strike the owner's vessel would not be put in jeopardy, that is, it would not be tied up at the dock.

Q. Were most of these jobs obtained by you in the Buffalo yard? A. I beg your pardon?

Q. Were most of these jobs obtained by you and your staff in the Buffalo yard?

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A. Yes, without exception during that period, all the jobs came through our office. The only—The jobs that Mr. Midnight pointed out that we get through the Cleveland office are large jobs. We were competing with other yards up and down the lake and have to be run through the engineering department, the drafting room, and there are materials sometimes that have to be made. So, those jobs we don't have the facilities for providing an estimate of that nature. They have to be principally with the large jumboizing and lengthening and so forth.

Q. Did you refuse any work that was offered to you at the Buffalo yard? A. No, sir.

Mr. Cavano: No other questions.

Trial Examiner: Cross examination.

JERRY W. THOMAN:

Cross-Examination.

Q. (By Mr. Kossoff.) Mr. Thoman, you mentioned a ship called the Mataafa. When were you first asked to do the job on the Mataafa? A. We were contacted on the Mataafa, as I remember, some time in June. We were posted by the owner and the owner's representative that the Mataafa was due to dry dock and they were going to dry dock her during the change over period in the automobile industry.

Q. Which occurred when? A. That occurred, as I remember, sometime in August.

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Q. Do you recall when in August? A. No, I don't.

Q. Was it early or late August? A. Well, as I remember, it was during the time—I was in Cleveland attending negotiations, and —

Q. That was all through August? A. I don't remember whether it was—I just don't remember.

Q. And was all contact on the Mataafa with you personally? A. Yes. I take that back—Pardon me.

Q. What was the nature of the work that had to be done on the Mataafa? A. She had a grounding, and that is as much as I know about her, because the actual damage is never determined until the vessel is on dry dock. The only information that we can get on the vessel prior to dry docking her is she had a disaster of some description.

Q. That is the Mataafa? A. Yes.

Q. And in June—the grounding had already occurred in June? A. Yes. In addition to the grounding, she had to go through her five year inspection.

Q. What happened between June and August, was it running after a grounding? A. Oh, yes, a vessel runs for two, three years after a

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grounding.

Q. I see. And you had no idea how long it would take to repair this vessel? A. Never until after she is docked.

Q. Tell me, how do you advise a new prospective customer if you could do the job if you don't know what was wrong with the ship, didn't you make an effort to find out?

Q. There was no question about being able to do the job. The problem was that we couldn't guarantee that we would have a labor force after the 1st of August.

Q. How many men would you need to do the job? A. How do I know.

Q. You have no idea? A. No.

Q. As far as you know, ten men could have done the job; is that correct? A. No, we don't get by with ten men.

Q. Twenty men? A. That's anybody's guess.

Q. Is it your guess that perhaps twenty men could have done the job? A. I wouldn't hazard a guess.

Q. Might twenty men have done the job? A. Could be.

Q. Isn't it a fact, that between August 11th, 1961 and

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September 13th, 1961, you had at least thirty-two men on your payroll? A. Between what dates?

Q. August 11th, 1961 and September 13th, 1961. A. That's reasonable, yeah.

Q. That's reasonable. Isn't it a fact, that the week ending September 13th, 1961, you had thirty-two men on your payroll? A. That's possible.

Q Do you know how long it took to do that job, eventually? A. I have no idea.

Q. As far as you know, all through these months of August and September and even July, if this job had to be done, your men would have done the job? A. No, I didn't know that. I had no reason to believe they would stay on the job as to what had happened in the past.

Q. Did they make any effort to walk out? A. No.

Q. Did anyone talk to you? A. They sure wouldn't walk off when there was work in the yard. They surely wouldn't have gained anything by walking away.

Q. There was very little work at that time; isn't that a fact?

A. Certainly.

Q. But there was some work? A. Peanuts, yes. We finished that gradually.

Q. When were you first contacted on the Ingalls? A. About the same time as the Mataafa.

Q. Is that in June? A. In that neighborhood, yes.

Q. What were you told on your first contact? A. We were told that she was slated for a five year inspection on the dry dock.

Q. And did they tell you when the five year period terminated? A. They wanted to get their—put her right in after the Mataafa if the change over period were of such duration that they could squeeze her in.

Q. How long does that take, the inspection? A. How long do what take?

Q. The inspection, five year inspection? A. Well, the inspection always takes a matter of hours, but the work

required to fulfill the Coast Guard requirements takes, for strictly a five year inspection, would run maybe three days.

Q. And you felt that at no time in August or September could you tell a prospective customer that a job could be gotten out that only took three days to do?

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A. I couldn't.

Q. Under oath and in good conscience do you say that you couldn't guarantee or that you couldn't feel with confidence that a three day job could be finished? A. I certainly could not, under oath.

Q. How many men are required to do an inspection job? A. Well, if you take the number of men working on the vessel concurrently—

Q. That's right. A. Well, say, give or take a few, maybe twenty-five, but you have different crafts involved that are not working concurrently, which might take as high as thirty, forty men.

Q. And yet, you had at least thirty men up until September 30th, 1961? A. If the records show, yes.

Q. And if the boat had been brought up at any time within three days prior to September 13th, 1961, the job could have been done, couldn't it? A. Would you repeat that?

Q. If the boat would have been brought into your yard within three days before September 13th, 1961, the job could have been done; isn't that correct? A. I would say that the owner that brought the boat into the dock would have rocks in his head if he would have taken

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the chance.

Q. Will you answer that question? A. I can't answer the question, because I don't know whether or not it would have been done or not.

Trial Examiner: You mean as far as history now shows it could have been done?

The Witness: As far as assuming that the Union would have acted then in the same manner that the history shows the action.

Q. (By Mr. Kossoff.) You must have discussed the labor situation with the men at some time? A. Discussed the labor situation with the men at some time?

Q. That's right. A. That's one thing you get crusified for around there, is discussing labor with the men.

Q. But you did anyway? A. I don't know if I discussed labor with the men. What do you mean?

Q. Discussing the labor situation with them, whether or not the job would be completed, whether or not you could get a job or surplus. Come now, don't you remember whether or not you discussed whether or not you completed a job during July or August, 1961, with any of your men? A. I know I expressed a desire to bring these big jobs

into the yard.

Q. You expressed that desire to Mr. DeJac, did you not? A. Probably did.

Q. And what did Mr. DeJac tell you? A. Well, he, as I remember, said that he could personally guarantee that the men would not walk off the job, but knowing Mr. DeJac for four years—

Q. That is all I asked you, what Mr. DeJac told you. You have answered. A. Okay.

Q. Isn't it a fact, that Mr. DeJac told you this about the vessel Drenkenmiller? A. Before I answer that question, I want to get one thing straight. I cannot make any arrangements with Mr. DeJac, because our agreements are made with the International Union.

Q. That is not the question. The question is, did he not tell you that? Would you please answer my question.

Trial Examiner: He has answered the question. Now, he wants to explain it. Go ahead, I want to hear it.

The Witness: Well, we had been informed in no uncertain terms that we are not supposed to make any deals or arrangements whatsoever with the local union officers. Everything, any agreement that has anything to do whatsoever with the contract has to be made with the International representatives.

Trial Examiner: All right, go ahead. Next question.

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Q. (By Mr. Kossoff.) Now, will you answer the question? A. No, Mr. DeJac may have said that he would guarantee that the job would be done.

Q. On the Drenkenmiller? A. Oh, the Drenkenmiller, yeah.

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Q. From what you described, there was a lot of work here this summer that you could have had if you had a contract; is that right? A. Yes, yes.

Q. Would that make this summer an overwhelming summer in

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terms of business? A. I'll put it this way, when you say an overwhelming summer, it wasn't—well, it wouldn't have made it any better than the previous summer, because we were fortunate to have the Atlantic Dealer conversion in the dry dock that summer, but it would have put us in a much better position for the winter work.

Q. Now, you have slack seasons every summer, don't you? A. Yes, as compared to the regular repair season.

Q. And to your knowlerge, there has alweys been minimum crews around for emergencies here every summer? A. Yeah.

Q. You said that the owner would have rocks in his head for taking a chance? A. Yeah.

Q. Is that what you told the owners? A. Yes, I could tell them that.

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JERRY W. THOMAN:

Recross Examination.

Q. (By Mr. Mamet.) DeJac participated in the negotiations, did he not? A. Yes, sir.

Q. And isn't it true, that Alexander explained to everyone

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at the negotiating table in their status? A. I think that was done, yes, sir.

Q. And at that time, DeJac's status was explained to you? A. Yeah, but I don't remember him as a business agent.

Q. It is possible that it was? A. It is possible.

Q. Now, you were informed that you had to deal with the International Union only; is that right? A. When it

comes to any agreement or arrangement, that is, that have to do with the yard policy or the contract, yes.

Q. Who told you that, your superior? A. I think Mr. Alexander made that very complaint at one meeting we had.

Q. That you had to negotiate a contract at the table? A. No, not to negotiate a contract, that we could not deal with the local officers of the Union in making any special arrangements or agreements, things of that sort.

Q. Now, after DeJac told you that the work—I'll guarantee getting it out, did you attempt to contact Alexander to see if you could work that out? A. No.

Q. You made no attempt to see if you could formalize that thru the International, or do it informally; is that right? A. No, sir.

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WALTER J. KNAPP was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: What is your full name?

The Witness: Walter J. Knapp, K-n-a-p-p.

Direct Examination.

Q. (By Mr. Cavano.) Where do you reside, Mr. Knapp? A. Toledo, 3608 Barcelona Drive.

Q. Are you affiliated with the American Shipbuilding Company? A. Yes, I am manager of the Toledo plant of the American Shipbuilding Company.

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Q. Commencing with August the 10th, 1961, forward, Mr. Knapp, were any opportunities given to you at the Toledo yard for work? A. Yes.

Q. Will you relate to us in detail what they were? A. There are notes I kept. On August 1 we were asked to make repairs on the steamer Thompson. She had damaged an unloading boom, and after they questioned our status as far as the contract was concerned, they took the work and had it performed elsewhere.

Q. Did you refuse to do that work? A. No.

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Q. What was the next incident? A. On August 7th we were asked about our labor situation, because there were two wheel blades to be changed on the steamer Schoelkoff, and after our labor situation was explained, this work was done by others.

Q. Did you refuse to do that work? A. No.

Q. What was your next incident? A. On August the 11th we were asked to do some electrical work, but when they questioned us on our labor situation, they asked if we would supply the cable, and the crew did the work themselves then.

Q. Did you do that? A. Pardon?

Q. Did you supply the cable? A. Yes, sir.

Q. And the work was done elsewhere? A. Yes, sir.

Q. What was your next incident? A. Again on August the 11th we were questioned about our labor situation, because they wanted us to change another wheel blade on the steamer John Ballard, and there again after they heard the labor situation, they had it done elsewhere.

Q. What was your next incident?

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A. On August 21st we were contacted by the Corps of Engineers about our labor dispute, because they wanted to dry dock and change a propeller.

Q. On what? A. On the dredge Markum.

Q. And what happened? A. They went elsewhere and had it done when they found out we were still unsettled.

Q. What was your next one? A. On August 21st the tug Dean asked to make repairs to an inboard stern bearings, but when they questioned our labor situation they went elsewhere.

Q. What else? A. On August 27th the steamer Emery Ford was looking for a dry dock to change four damaged wheel blades, and when they questioned our labor situation they went elsewhere for their repairs.

Q. What was the next one? A. On September 2nd, we were contacted by the owners of the steamer Frank Armstrong for a dry docking to repair three wheel blades. When they questioned our labor situation, they went elsewhere.

Q. Next? A. And on September 10th, the U. S. Corps of Engineers, dredge Hayes, they wanted work to be done on a snow meter

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installation, but because of our labor situation they didn't have it done. I don't know where that was done.

Q. Next? A. On September 7th we were contacted again by the U. S. Corps of Engineers on the dredge Markum.

Mr. Kossoff: What was that date?

The Witness: Dredge Markum.

Mr. Kossoff: What date?

The Witness: September 7th, and they were looking for a dry dock to change a wheel and repair some dump doors. That's as far as I kept notes.

WALTER J. KNAPP:

Cross-Examination.

Q. (By Mr. Kossoff.) Who is your immediate superior, Mr. Knapp? A. Mr. Midnight.

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Q. He is in Cleveland, isn't that right, and you are in Toledo? A. Yes.

Q. Is he the one that sets policies for your yard? A. Yes.

Q. And naturally, the policy—it's a policy matter as to what will be told prospective customers when they request you to do work; isn't that correct? A. Yes.

Q. I see, and, therefore, you did have a discussion with Mr. Midnight about what you tell prospective customers who call for work after August 1st; isn't that right? A. Yes.

Q. And where did this conversation take place? A. I don't know specifically where it took place.

Q. Well, approximately when did it take place then? A. Oh, sometime during one of our negotiating periods.

Q. In a caucus, right, it wasn't in front of the Union? A. Not in front of the Union.

Q. No, of course not. What took place, what did you say to him, and what did he say to you? A. Nearly anyone that contacted us, we would explain the situation.

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Q What did Mr. Midnight tell you? A. It wasn't a direct quote to me.

Q. To all the managers. A. That we would tell the customers exactly what our labor situation was.

Q. Do you always tell your customers about your labor situation? A. Oh, sure. They were questioning in July already.

Q. And did you tell them in January about your labor situation? A. No.

Q. There was one point when you started telling them; is that right? A. Well, I'll have to go back to my other statement. I can't think of a time they didn't ask me first.

Q. Tell me this whole conversation with Mr. Midnight. What did he say to tell these people, exactly, did he tell them to explain to them how many clauses you had been agreed upon, about assurance of getting work done, what did he tell you to tell them? A. As I said, this was a general discussion, and my inference

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was to tell them we were still negotiating, period.

Q. Did he give you any reason why you should do this? A. No.

Q. Gave no reason at all? A. Nothing specifically, no.

Q. Now, you spoke of this first job on August 1st, the steamer Thompson, was that it? A. Uh-huh.

Q. What was the damage? The damage was to the unloading boom, is that what you said? A. Yes.

Q. And how much is a job like that worth to the company? A. I don't know.

Q. Approximately, is that a $50,000 job? A. I couldn't give you an approximate figure, because we didn't make an estimate on it. In fact, we didn't even get to see it.

Q. Were you called in your office? A. Yes.

Q. And who called you about that job? A. The owner.

Q. What is his name? A. I didn't jot it down.

Q. I see. What did the owner say to you? A. That there was a—they had dropped the boom—there

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was damage to the boom, what is the labor situation, can you come out and fix it.

Q. I see, and what did you answer him? A. Then when I told him the labor situation, they said, "Never mind, we'll take it up to Detroit", and they had it done up there.

Q. I see. When did you make that note sheet, by the way? A. Oh, as it happened. This was the entire period.

Q. This was something that you made simultaneously? A. Yes.

Q. Who told you to make this list? A. Nobody.

Q. Nobody told you to make this up? A. No, that was for my own information.

Trial Examiner: What did you expect to use it for, did you have anything in mind?

The Witness: Pardon?

Trial Examiner: What did you expect to use the information for?

The Witness: Well, I just—I just wanted a record of these things that happened, because many times in my own mind I often wonder what we do lose with a situation like this. So, I actually kept my own record on it.

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Q. Well, how much did you lose? A. I don't know.

Q. Well, if this was the purpose of making it, wouldn't it have been reasonable— A. It's the ships involved.

Q. Well, the list then is completely meaningless unless you know what is involved? A. It may be meaningless to you, but it's important to me.

Q. How much is a loading boom? A. I don't know.

Q. But yet it had significance? A. Yes.

Q. And the significance is to tell you what you lost; is that right?

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A. Yes.

Q. Any other significance? A. No.

Q. I see. Now, who called you on August 7th on the steamer Sckoelkoff? Is that the name of that license? You referred to it. I would like to refer to it also.

The steamer Sckcelkoff, on August 7th change two wheel blades. Who called you on that? A. I don't know exactly. It could have been one of two or three people called on that.

Q. Two or three people? A. Yeah.

Q. It must have been an urgent job if two or three— A. I said one of two or three people.

Q. Well, who might they be? A. Well, it could have been Mike Boechamp, it could have been Howard Brown, or it could have been any of some independent surveyor they picked.

Q. And you are on friendly terms with Boechamp and Brown, aren't you? A. Pardon?

Q. You are on friendly terms with these two men, aren't you? A. Yes.

Q. You have lunch with all these people, don't you, that called you about jobs?

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A. Yes.

Q. You have lunch with them on occasions and other social gatherings; isn't that right? A. Yes.

Q. What did Mr. Boechamp or Mr. Brown, whoever it was that called you on the steamer Sekoelkoff say to you when they called? A. I don't know verbatim what they said, but they were interested in if we had a contract signed or not, and that was the extent of the conversation. We don't have a chance to argue with them in making a decision like that.

Q. Were these emergency repairs? A. Yes.

Q. And these people were in a pretty big hurry to get this out, weren't they? A. Yes.

Q. And yet they all asked you on contract negotiations, on how you were coming around; is that right? A. Oh, yes.

Q. Do you recall who called you on August the 11th, for the steamer Consumers something or other to rewire the rudder on that? A. That would be Balland and Cornelius.

Q. And the same people that called you on August 7th called you on August 11th?

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A. Yes.

Q. And they wanted to know again what the progress was in negotiations? A. Yes.

Q. What did you tell these people? A. We were still negotiating, we had no contract.

Q. That wasn't—Didn't they also want to know whether or not you could get the work done? A. No, that is all they asked.

Q. I see. A[illegible]ey made their mind up.

Q. And who called you on August 11th to remove the wheel blade from the steamer John Balland? A. Same people.

Q. You mean they called you on two different occasions the same day? A. Yeah.

Q. And this is Balland and Cornelius? A. Yes.

Q. And, evidently, they figured that the contract situation must have changed between the first call and the second call; is that correct? A. Presumably.

Q. I see, and on August 21st, who called you for the dredge Markum?

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A. I generally deal with a Mr. Bonestel.

Q. Mr. Bonestel called you, I see. A. Yeah.

Q. And how many times did somebody call you to repair the dredge Markum; there were numerous calls, weren't there? A. Yes.

Q. What did you tell him when he called you? A. Same thing I just got done saying.

Q. I see, but he didn't ask you about labor negotiations, about the labor situation when he called you? A. Oh, yes.

* * * * *

By the way, did you ever tell anybody about contract situations before they asked you? A. Did I?

Q. Did you ever volunteer any information to anyone? A. I might have.

Q. I see. Well, did not you, in fact, make it a point to

tell everyone who called what the contract situation was? A. I might have.

Q. Well, didn't you? A. I wouldn't say I did.

Q. Are you saying that you might have told everyone? A. I might not have, yes.

Q. In other words, you would have disregarded Mr. Midnight's instructions? A. Well—

Q. Come now. A. I would like to go back and tell you that most of them—I can't think of any that didn't ask me first.

Q. Well, in other words, you are changing your answer. Your answer is that you did not volunteer to anyone? A. Yes, I did. When they asked me, then I volunteered the information.

Q. And whoever didn't ask you, you made sure they knew about it; isn't that right? A. Yes.

Q. In fact, there were several people whom you told on your own; isn't that correct? A. Probably, yes.

Q. On several different jobs; isn't that correct? A. Probably, yes.

Trial Examiner: Did any of the customers ask you how

it looked?

The Witness: Yes.

Trial Examiner: What did you tell them?

The Witness: Not too good.

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Q. (By Mr. Kossoff.) Isn't it a fact, Mr. Knapp, that the week ending August 16th, 1961, you had three employees working at your yard in Toledo? A. It could be.

Q. Isn't it a fact, isn't it? About the—How about the week ending August 23rd, isn't it a fact that you had four employees working there? A. I don't know. I would have to look at the records.

Q. Do you want to look at the records? You have them with you, why don't you check them.

Trial Examiner: Just go ahead. The witness said he kept it on the productive workers.

Q. (By Mr. Kossoff.) Well, let's check how many you kept. A. What date are you looking for?

Q. The week ending August 16th, 1961? A. Well, we had one machinist in the machine shop. The other one was on vacation. We had a dispatcher working.

Q. So, you had two people in active production; is that correct, in the week ending August 16th? A. Just one.

Q. And not from the group of eight unions; is that correct? A. Yes.

Q. How about the following week, the week ending August 23rd, 1961, how many production employees did you have? A. One.

Q. Was he from the group of eight unions or from the other, the Machinists? A. One, yes. One Machinist.

Q. The week ending August 30th, 1961, how many employees did you have in the group of eight unions? A. August 30th?

Q. August 30th. A. One Machinist.

Q. And none from the group of eight? A. No.

Q. What about the week ending September 6th, 1961, how many did you have, how many from the group of eight units or unit? A. September what?

Q. 6th? A. Two Machinists.

Q. And no production people? A. No.

Trial Examiner: He had none from the bargaining units involved in the case. Excuse me, Mr. Kossoff, I thought the witness testified a few minutes ago that after the certain

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day—August 10th or 11th, they laid off people that were doing maintenance work and they kept on some Machinists and this went on until after the labor dispute was settled.

Q. (By Mr. Kossoff.) Was it down to zero then all the way until October 27th? A. Yes.

Mr. Cavano: Object to that. It was not down to zero. There were men that were working as Machinists. That does not represent zero.

Q. (By Mr. Kossoff.) Other than the machinists, was there anyone from the group of eight units? A. The group of eight units, just the machinists.

Q. And that is a different unit, that is a different unit, they have a different contract; isn't that correct? A. (Indicating in the affirmative.)

Q. How many Machinists were there? A. Two.

Q. Well, we have got through the week of September—

Trial Examiner: You want to know how many Machinists there were on every week?

Q. (By Mr. Kossoff.) Did it ever go beyond five until October 27th? A. On October 27th it was still two Machinists.

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Q. (By Mr. Mamet.) This meeting of August 10th, Mr. Knapp, of all the plant managers, is that where you received your final instructions on what to tell the customers? A. No.

Q. You had received your instructions before from Mr. Midnight? A. I would say there was no specific date of instructions. We had general discussions all the way through this thing.

Q. All through negotiations? A. Yes.

Q. What was the earliest date you had decided to tell your customers that you had labor trouble and no signed contract, what was the earliest date you decided to tell them that when they started calling? A. Well, some were asking in the middle of July.

Q. Please listen to the question. What was the earliest date Mr. Midnight told you to start telling your customers when they called about the labor trouble, as you call it? A. We had discussions sometime in July. I don't know the exact date.

Q. And from then on out you followed this course and pattern that you described to Mr. Kossoff? A. Yes.

Q. Did you ever plead to these friends of yours that you had lunch with "Give us the work, we'll try and get it out,

we need it." A. No.

Q. You never asked them for any favors? A. No.

Q. Never asked them to go along? A. No.

Q. It's part of your business to be friendly with these people all the time? A. Yes, it is.

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Q. (By Mr. Mamet.) Did you ever go to Midnight and say, "Isn't there anything we can do to get this work?" A. No.

Q. You were losing work? A. Oh, yes.

Q. It's your job to get work, isn't it? A. Right.

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NATHAN LOUIS was called as a witness by and on behalf of General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Give the Reporter your full name.

The Witness: Nathan Louis.

Direct Examination.

Q. (By Mr. Kossoff.) Would you state your address for the Trial Examiner, please? A. Office of the Industrial Manager, New York Naval Ship Yard, Brooklyn, New York.

Q. What capacity do you have with the Industrial Manager of the United States Navy, Brooklyn, New York? A. Contract specialist.

Q. Mr. Louis, did you have a conversation with Mr. Stafford of the American Shipbuilding Company on or about August 31st, 1961, in reference to a naval vessel, U. S. S. Prescott? A. Yes, sir, I did.

Q Do you have a clear recollection of what was said during that conversation between you and him? A. Well, if I can consult my memorandum on the situation,

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it would give me a pretty clear picture of just what was said at the time.

Q. Did you make that memorandum at the time this conversation took place? A. Yes, sir.

Q. Wasn't that shortly after the conversation that you made them? A. Yes, sir.

Q. Would that refresh your memory? A. Yes, sir.

Q. Would you please consult your memorandum and tell the Trial Examiner what was said during the conversation of August 31st, 1961, between you and Mr. Stafford of the American Shipbuilding Company? A. Yes, sir. On the 31st of August, I phoned Mr. Stafford of the American Shipbuilding Company's Cleveland office and advised Mr. Stafford of the work to be done on the vessel, that is, U. S. S. Prescott, which is under the cognizance of the Industrial Manager of the Third District. I advised Mr. Stafford we would be sending him a standard form 13 and requested him to indicate both price and time required to perform the work indicated in the specifications. Mr. Stafford was to phone in the estimate and confirm with a written quotation, a form 18.

Q. Did Mr. Stafford phone you back?

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A. No, sir.

Q. As a result of his not calling you, did you subsequently call him? A. Yes, sir, I did.

Q. What date did you call him? A. The 7th of September, 1961.

Q. Would you please tell the Trial Examiner what was said during that conversation on September 7th, 1961? A. Yes, sir, Mr. Stafford advised that two difficulties prevented the company from docking the vessel. One was the labor

contract. The labor contract, Mr. Stafford said, had expired on the 3rd of August, 1961. Work was continuing, but no new work was brought in as men would walk off the job if it was attempted. Mr. Stafford indicated that the company was not in a position to do the work; and secondly, Mr. Stafford indicated that the gate in the plant's big dock is being repaired in the small dock. Accordingly, no dock was available for the U. S. S. Prescott, and Mr. Stafford indicated that he would advise when the situation cleared up and the company was in a position to proceed with the work on the Prescott.

Q. Was there an addendum issued on the original specifications for the job sometime in September of 1961? A. Yes, sir.

Q. When did this take place, and what was the nature of the

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addendum? A. On the 15th of September, 1961, and the nature basically was to provide for the balance of the propeller.

Q. And did you have a communication with Mr. Stafford in relation to the addendum or in relation to any of the work that had to be done at some time in September of 1961 after the issuance of the addendum? A. Yes, sir, I did.

Q. When did that occur? A. On the 18th of September, 1961.

Q. Did you call him or did he call you? A. No, I phoned Mr. Stafford at the Cleveland Office of American Shipbuilding.

Q. Would you tell the Trial Examiner what was said in that conversation? A. Yes, sir. Mr. Stafford indicated

that he expected the dock addition to be cleared up in approximately two or three days and as far as the labor situation, Mr. Stafford indicated that negotiations were still going on and it was still open that a strike would result if the ship were brought into the plant.

Q. And did he call you—

Mr. Cavano: Excuse me, where you finished, sir?

The Witness: I was going to add one further statement. Mr. Stafford agreed to call when the situation cleared up:

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Q. (By Mr. Kossoff.) Did he phone you within several days after September 18th, 1961? A. No, sir.

Q. Did you phone him? A. Yes, I did.

Q. When did you phone him? A. On the 2nd of October, 1961.

Q. And would you tell the Trial Examiner what was said in that conversation? A. Yes, sir. Mr. Stafford indicated that the dock situation had been cleared up, also, he indicated that the labor situation was unsettled. The men were working without a contract, but no new work could be taken in and the men would walk off the job if the work was put into the plant. Mr. Stafford also indicated that he could not balance the propeller, that is, no American Shipbuilding plant or no other sources in the lake area.

Q. Did you have any further conversation with Mr. Stafford at this time in regards to balancing the propeller? A. On October 2nd, that was the only conversation I had with Mr. Stafford.

Q All right. Now did you receive any communication from the officers of the Type Commander on October 2nd, 1961, in reference to the services of the vessel Prescott?

Trial Examiner: What kind of commander?

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Mr. Kossoff: The Type, T-y-p-e Commander.

The Witness:

A. Yes, sir.

Q (By Mr. Kossoff.) What is the Type Commander, what is his function? A. Well, in general, I would say his function would—would normally authorize work to be done on various vessels under his cognizance.

Q. What was the nature of the communication? A. It was in the nature of a dispatch dated the 2nd of October, on which he indicated that the services on the Prescott to dry dock as soon as possible and the propeller be replaced.

Q. Was there any decision made as to where the balancing of the propeller would be done? A. Yes, sir, there was.

Q Where was it decided to do the balancing of the propeller? A. It was determined to do the balancing of the propeller in the New York Naval Ship Yard.

Q. And where was the balancing of the work determined to be done? A. It was going to be done at the Naval Reserve Center at Rochester, New York, where the Prescott was stationed by New York ship work personnel.

Q. And was this to be done by the Navy Ship Yard only if

American Ship Company did not do it or regardless of whether American Shipbuilding Company could do it? A. No. it was only as a result of not being able to have the work accomplished at the American Shipbuilding Company's plant.

Q. On October 5th; 1961, did you have a communication with anyone else in the Naval heirarchy in regard to

the vessel U. S. S. Prescott? A. Yes. On October 5th we phoned the industrial manager's office at Philadelphia regarding the possibility of having the work performed on the vessel at a yard on the Great Lakes, under the cognizance of the industrial manager at Philadelphia.

Q. Who did you speak with there, did you say? A. Mr. Cahnon.

Q. Is that C-a-n-n-o-n? A. Yes, sir.

Q. What is Mr. Cannon's—What did Mr. Cannon say about the facilities for docking the vessel Prescott? A. He indicated that the only facilities they have inland on Lake Erie are the American Shipbuilding plants at Lorain and Toledo, Ohio.

Q As a result of this communication from Mr. Cannon, did you once again have contact with the American Shipbuilding Company?

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A. Yes, sir.

Q. When did it occur? A. On the 5th of October, 1961.

Q. When did you call? A. I called the American Shipbuilding Company of the Cleveland office and I spoke to Mr. Williams.

Q. And what was said in this conversation by Mr. Williams? A. He said the company was not in a position to do the dry docking work at this time at any of their plants due to the labor difficulty. Mr. Williams further indicated that settlement was unsatisfied. He would advise when the Company was cleared up and were ready to do the required work on the vessel.

Q. Any further discussion had as to the vessel, U. S. S. Prescott, on October 6th, 1961? A. Yes, sir.

Q On October 5th, 1961, the Type Commander agreed in the phone conversation with the industrial manager in New

York to have the work performed by the New York Naval Ship Yard personnel.

Q. Mr. Louis, the fact that a ship builder is in labor negotiations normally prevents the Navy from giving it work as the nature on the U. S. S. Prescott?

Mr. Cavano: Object.

Trial Examiner: Sustained. He will speak what he knows,

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but I won't let him speak for the United States Government.

Q. (By Mr. Kossoff.) Will you speak as far as you know? A. I'm sorry.

Q. Did you at any time refuse or indicate any reluctance to bring the ship into dock for repairs at the American Shipbuilding Company because of labor negotiations? A. No, sir, not as far as I can recall.

Q. Would the inability of the American Shipbuilding Company to dynamically balance the propeller be prevented from it being awarded the remaining repair work on the U. S. S. Prescott? A. No, sir.

Q. Now, you mentioned the work as finally awarded to the New York Naval Ship Yard. On what day was the award made? A. If I may consult my records here. The balancing of the propeller was authorized on October 4th, 1961.

Q. All right, and when was the actual repair work done? A. Well, the balancing of the propeller took place on October 5th and 6th, 1961.

Q. And when was the remainder of the work done? A. Well, the propeller was shipped to Rochester, New York on October 9th, and the balance of the work was accomplished at Rochester on October 11th through the 13th, 1961.

Q. Now, Mr. Louis, at any time did Mr. Stafford call you as distinguished from your calling him?

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A. No, sir.

Q. Are you here under subpoena, Mr. Louis? A. Yes, sir.

Q. And you have come from New York to testify? A. Yes, sir.

Mr. Kossoff: Nothing further.

Trial Examiner: Cross examination?

Mr. Cavano: Yes.

NATHAN LOUIS:

Cross-Examination.

Q. (By Mr. Cavano.) Mr. Louis, may I see the notes, please, from which you testified? A. Yes.

Q May I examine them for a moment? A. This specific one, yes

Q. Yes, would you give me the specific conversation? A. This is the first one, I believe, I referred to.

Q. And your next one, please. And your next one, please. I believe that was the last one? A. Yes.

Mr. Cavano: No questions.

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RUSSELL FERRY

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was called as a witness by and on behalf of General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Give your name to the reporter.

The Witness: Russell Ferry.

Direct Examination.

Q. (By Mr. Kossoff.) Where do you live? A. 182nd and Stony Avenue, South Holland, Illinois.

Q. Where do you work, Mr. Ferry? A. American Shipbuilding Company, South Chicago yards.

Q. And how long have you worked with them? A. Seventeen years.

Q. And what do you do with them, what are your particular jobs there? A. Well, burner, in particular.

Q. I see, and are you a member of any union? A. Yes, sir. Local 374 of the Boilermakers.

Q. And how long have you belonged to that Union? A. Twenty-three years.

Q. Now, calling your attention to the seventeen years that you have worked for the American Shipbuilding Company, except for any strikes that have occurred in 1958 and possibly in 1955, do you recall ever being laid off or did you work steadily all the time? A. Yes, sir.

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Q. Now, during the summers of the seventeen years that you have worked with American Shipbuilding Company, what did you generally do in the summer time? A. Well, maintenance, consisted of painting and repairing the docks and repair tools for the following winter work, and emergency repair work that comes up during the summer periodically.

Q. And during the seventeen years that you have worked with the Company, has there always been a nucleus crew during the summer time? A. Yes.

Q. In the seventeen year period, Mr. Ferry, had you ever experienced the time when the South Chicago yard was completely shut down other than during a strike? A. No, sir.

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Q. And what happened after you completed them, what did you do? You say you were off?

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A. We went on strike.

Q. You went on strike? A. That's right.

Q. And who told you to go out on strike?

Mr. Cavano: I'll object.

Trial Examiner: Wait, what year is this you are talking about?

Mr. Kossoff: '58. I think I said 1958.

Trial Examiner: Maybe you did. The Court Reporter will note that the year is '58. I happened to put down '61. The objection is overruled. The question is, who told you to go out on strike?

Q. (By Mr. Kossoff.) Who told you to go out on strike? A. Our Union, our representatives.

Q. And did these same representatives tell you whether or not these other locals had been striking prior to you?

Mr. Cavano: Objection.

Trial Examiner: Overruled.

Q. (By Mr. Kossoff.) What did they tell you? A. They told us that the other yards went out on the 1st of the month.

Q. And did they tell you why you weren't permitted to go out when the others did? A. They wanted us to finish the work that was in the dock at the time.

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Q. What was in the dock? A. The government barges.

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Q. And what was the situation with reference to the period two or three weeks before August the 1st, 1961, as to whether or not there was any work to be done in the way of contracts or ships to be repaired in the Chicago yard? A. In the Chicago yard we never had any work in that period.

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Q. Pardon me? A. We didn't have any work at that period.

Q. You didn't have any work at that period? A. Outside of our regular maintenance that we usually do in the summer time.

Q. That was the summer of 1961? A. Yes, sir.

Q. But that was not true in the summer of '60 or '59? A. No, sir.

Q. Now, I believe you testified about an incident in 1955. Was there a strike at that time? A. I believe there was. I was on vacation at the time.

Q. And during the period of that strike the Chicago ship yard was closed down completely, was it not? A. Yes, sir, to my knowledge it was.

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JOHN PILTAVER was called as a witness by and on behalf of General Counsel and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (By Mr. Kossoff.) Sir, where do you work? A. At American Shipbuilding Company, the Chicago yard.

Q. How long have you worked for them? A. The last thirteen years.

Q. And what is your job with them? A. Classification?

Q. Yeah.

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A. Rigger.

Q. And are you a member of a labor union? A. Local 374.

Q. And approximately how long have you belonged with them? A. Fifteen years.

Q. Were you laid off on August 11th, 1961? A. Yes, sir.

Q. And when were you called back to work? A. September 25th.

Q. 1961? A. 1961.

Q. And how long a period of time were you called back for? A. Through the 26th of September.

Q. All right. What were you doing when you were laid off on August 11th, 1961? A. Well, I was doing preparatory work like splicing cable for winter work.

Q. Was that preparatory work? A. Prepatory work.

Q. Is that considered non-productive work? A. I would say so.

Q. Other than the time of September 25th, 1961, when you were recalled back for one day, when were you called back for a longer period of time? A. November 1st.

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Q. And have you continued to work since the time when you were called back? A. Yes.

Q. And when you were called back on November 1st, 1961, what was the job that you were assigned to do? A. Splice cable.

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JOHN PILTAVEK:

Cross-Examination.

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Q. On the day you were laid off, August the 11th, 1961, was there a ship in the dry dock? A. No, sir.

Q. Can you recall from your own personal knowledge as to

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when you worked on a ship in the Chicago yard prior to August 11th, '61? A. If I can remember, I think it was in the month of July, '61.

Q. Was that the Carmie A. Thompson? A. I would believe so, yes.

Q. How long was the Carmie Thompson in the yard for repair? A. I think she was. No, I can't quote entirely —she had to be in at least a couple weeks, to my knowledge.

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RICHARD JANSKY was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: All right, what is your name?

The Witness: Richard Jansky, J-a-n-s-k-y.

Direct Examination.

Q. (By Mr. Kossoff.) Would you state for the record your address, please? A. 106 56th Avenue, Chicago, Illinois.

Q. Where do you work, sir? A. American Shipbiulding.

Q. And what is your occupation with them? A. I'm classified as a boilermaker.

Q. How long have you worked for American Shipbuilding Company?

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A. Fifteen years.

Q. Where do you—Which of the yards of American Shipbuilding Company do you work for? A. Chicago.

Q. And have you worked there for approximately fifteen years? A. Yes, sir.

Q. Do you belong to any union? A. Yes, I do, Local 374.

Q. Is that the Boilermakers? A. Boilermakers.

Q. And how long have you been a member of that Union? A. Roughly fifteen years.

Q. Now, calling your attention to the period of time the fifteen years that you worked for the Company, except for any strikes that have taken place either in 1958 or the

short one in 1959, do you recall any time at all that the South Chicago yard had been completely shut down? A. No, sir.

Q. Did you work steadily during these summers, during the past fifteen years you have been with the Company? A. Yes, sir.

Q. Describe the work that you performed in the summer time? A. Maintenance.

Q. For example, what kind of maintenance work do you do? A. Keeping the yard in shape, painting, repairs—whatever

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has to be repaired in the summer time for the winter.

Q. Was there any emergency repair work to be done in the summer time? A. Yes, sir.

Q. Well, then, this seventeen years—or fifteen years that you worked for the company, was there always a nucleus or minor crew that was with the company during the summer time? A. Yes, sir.

Q. During this period, fifteen year period that you have been with the company, did you ever get laid off? A. No, sir.

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Q. (By Mr. Kossoff.) Were you working during August of 1958, the year of the strike? Were you working at any time before the strike began? A. Yes.

Q. And did you go out on strike at any time in August of '58? A. About the 14th.

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Q. Do you know why the South Chicago Local went out on the 14th instead of the same time as the other lots?

Mr. Cavano: Objection.

Trial Examiner: I'll take the answer.

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The Witness:

A. To my knowledge, it was to finish the barges in the dock.

Q. What barges are you talking about? A. The two government jobs.

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Q. Did you or your crew finish the barges? A. To my knowledge, they were finished.

Q. And did you go on strike after they were finished? A. Right.

Q. Did you work overtime the last week? A. I think I put in a couple nights over.

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MARTIN F. SOELLNER was called as a witness by and on behalf of General Counsel, and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Be seated. Your full name, please.

The Witness: Martin F. Soellner, S-o-e-l-l-n-e-r.

Direct Examination.

Q. (By Mr. Kossoff.) Would you state your address for the record, sir? A. 203 Timreck Drive, Munster, Indiana.

Q. And are you under subpoena to testify today? A. I am, sir.

Q. What is your occupation, sir? A. I'm the office manager and accountant for Calumet Shipyard and Dry Dock Company.

Q. In that capacity, are you in charge of the company records? A. I am the custodian of the fiscal and personal records.

Q. Is that for Calumet— A. Shipyard and Dry Dock Company.

Q So, did your company do any work on the Pioneer Challenger during the year 1961?

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A. Yes, sir.

Q (By Mr. Kossoff.) When did you do work to the Pioneer Challenger? A. I have the records here with me, and if I may indicate from the records I can give you specific projects. We have a requisition from Hutchinson & Company, managers, their order No. 12061 to furnish men to lower into engine room and connect one 250 horsepower armature weighing 1500 pounds. This work was accomplished at inland No. 2 dock on October 2nd and 3rd, a total of eighty-eight and a half hours consumed time.

Q. That was in 1961? A. On October 2nd and 3rd of 1961.

Q. Did you do any further work in on the Pioneer Challenger during 1961? A. Yes, sir.

Mr. Cavano: Excuse me, I wish to object to the question. Not for the purpose of impeding the witnesses's answer, but I would like to know—the questions are not clear to me as to whether the work is done upon the ship in

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the dry dock or whether it's work done for the ship, and this may be important.

Trial Examiner: Well, that's true, it may. Of course, you could bring it out in cross, but perhaps Mr. Kossoff has no intention of going into more work on that point.

Q. (By Mr. Kossoff.) Could you say, could you tell where that work was done? A. The job No. 12061 was performed on the vessel at the Inland No 2 dock. Inland Steel No. 2 dock. The vessel was not in our yard.

Q. Is that a common procedure, to do work outside of your yard for your company?

Mr. Cavano: Objection.

Trial Examiner: For any company.

Q. (By Mr. Kossoff.) Or for any Company?

Trial Examiner: Objection is overruled.

The Witness:

A. I cannot answer for other companies.

Q. How about you? A. We do some of the work in our own yard and we do some of the work outside of the yard, various facilities in the immediate facilities.

Q. With your men? A. With our men, yes, sir.

Q What is the next requisition that you had for work on

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the Pioneer Challenger? A. I have another requisition from Hutchinson & Company on Order 2067 to machine a break drum on the starboard side of the forward anchor winch. This is partially the continuance of the first job and was taken to our yard and was completed in our yard; principally, with the total consumed elapsed time of forty-eight and a quarter hours.

Q. And what is the next requisition that you have for work?

Mr. Cavano: Excuse me, could we have the date, please?

The Witness: The work was performed on October 10th and 11th.

Q. (By Mr. Kossoff:) 1961? A. 1961.

Q. What was the next requisition that you had for work on the Pioneer Challenger? A. We have another requisition here from Hutchinson & Company, their order No. 12350, to do temporary repairs on a cracked sheet stake.

Q. Where was the work done? A. This work was performed in the Inland Steel Dock No. 2, Inland Steel Company.

Q. Was it done on the vessel? A. On the vessel on October 15th, 1961. The total consumed time was sixty-two hours.

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Q. Where are your yards located? A. 367 Harbor Avenue, Chicago 17, Illinois.

Q. Does your yard eved do any emergencies repairs on vessels? A. We do when we have requests from ship personnel or their authorized agent.

Q Is this a common occurrence?

Mr. Cavano: Objection.

Trial Examiner: Does he get emergency work?

Q. (By Mr. Kossoff.) Did you get any calls for emergency work during the year 1961?

A. We have had calls during 1961 for emergency repair work, yes.

Q. (By Mr. Kossoff.) Did you get any calls for emergency repairs on vessels during August, September and October of 1961? A. Yes, sir.

Q. Did you complete the repair work? A. Whenever it was within the province of our facilities to do so within the alloted time that the ship's personnel or authorized agents would allow for the repair work.

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Q. (By Mr. Kossoff.) Was there any inquiry from Pioneer Challenger as to your labor situation? A. None that I was made aware of.

Trial Examiner: Now, so that the record will be straight, you may inquire now as to whether or not his labor situation is like a labor situation in another contract.

Q. (By Mr. Kossoff.) Do you have a contract with the Boilermakers Union? A. We have, or rather I should say we did have an active contract which expired on August 7th, 1961, and we have been operating under a gentleman's agreement pending negotiations with Local 374 of the Boilermakers.?

Q. Have you reached a new contract yet? A. A complete contract as yet has not been actually resolved.

Q. And the men have continued to work? A. Yes, sir.

Trial Examiner: Mr. Soellner, while they are waiting, you described, according to my notes, three jobs on or for the Pioneer Challenger?

The Witness: That is right, sir.

Trial Examiner: Did any of those jobs require the dry docking of that vessel?

The Witness: No, sir. Two of the jobs were accomplished

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at the —

Trial Examiner: Inland Dock?

The Witness: Inland Dock, and one of the projects, the machining of the break drum, was, of course, done in outer shop and then returned to the vessel and put on at the Inland dock.

Q. (By Mr. Kossoff.) Did you have any vessels in your dry dock during the summer of 1961? A. Yes, sir.

Q. Which ones did you have? A. Well, at the moment there is a tug from Great Lakes towing on the dock, on the dry dock.

Q. Which ones did you have in August of 1961, could you check your records, if it will refresh your memory? A. I can't give you any specific name of a vessel now, and, of course, those records weren't subpoenaed in the—or weren't listed in the subpoena, so I didn't bring my complete office records.

Q. (By Mr. Kossoff.) But you have records with you now which indicate the name of some ships which were in your dock in August and September of 1961; is that correct?

Mr. Cavano: Objection.

The Witness:

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A. No.

Q. You have none at all?

Trial Examiner: He says he has none. Now, again, I want to ask, do you have any particular vessel or ship in mind, Mr. Kossoff?

Mr. Kossoff: I don't have any particular ship.

Trial Examiner: What is your theory then?

Mr. Kossoff: Theory is that there wasn't a single ship owner who inquired as to the labor negotiations at the Calumet Ship yard.

Mr. Cavano: I'm going to object to this speech, while the witness is sitting in the court room.

Trial Examiner: Your objection is overruled. This witness is an intelligent company official and there is no danger involved here.

Mr. Kossoff: And the picture Respondent has been attempting to paint throughout this hearing is that all the ship owners that they have ever dealt with and people they have never dealt with before, perhaps calling up, and the first question they asked, whenever they have a boat to be repaired is, how is your labor negotiations.

Trial Examiner: As I recall, some of the Respondent's testimony, one of the witnesses and perhaps two, I don't know, for Respondent, indicated that if the Company—if the customer didn't ask how the labor relations were at a

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specific time, he was under instructions from his superior to tell them or to warn them that they had a labor contract open, they had reached no agreements, and the implication I

got was that he felt the responsibility to the customer to advise them as to their labor situation. That is what the company admits here.

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Q. (By Mr. Kossoff.) On any jobs you got, was there any inquiry as to your labor situation? A. I was never made aware of the fact.

Q. Did anyone from your company, to your knowledge, when customers called to get work done with your company, that they be informed of the labor negotiation situation? A. No. It was just a question of whether our facilities were able to do the job within the allotted amount of time.

Q. You mean the size of your facilities? A. That's right.

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MARTIN F. SOELLNER:

Direct Examination.

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Q. (By Mr. Mamet.) Did you do work on the Sansibar? A. Yes, sir.

Q. Was this work in connection with their bow thrust? A. I don't know what you mean by a bow thrust, but we had a project for the S. S. Sansibar for Columbia Transportation Company on August 24th, 1961. It was a renewal of a seal in a wheel cam.

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Q. How about the American Steamship Company? A. Yes, sir.

Q. Give us the name of the ships for the American Steamship Company. A. That we did work for?

Q. Yes. A. The Skhoelkoph.

Q. What? A. Skhoelkoph.

Q. Spell it. A. S-k-h-o-e-l-k-o-p-h. The U. S. Gypsum, G-y-p-s-u-m, J. S. Ashley, A-s-h-l-e-y, the David P. Thompson, Dowe Chemical, and Consumers Power.

Q. Do any work for Socony Mobile? A. Yes, sir.

Q. Do any work for Cleveland Tanker? A. Yes, sir.

Q. Do any work for National Marine Service? A. Yes, sir.

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Q. Did you do any work for Bolland and Cornelius? A. Yes, sir.

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Q. (By Mr. Mamet.) Do any work for Pickens Mather & Company? A. Yes, in their Inter Lake Steamship Company.

Q. What was the name of the ship? A. What is that?

Q. What is the name of the ship? A. We have had lots of vessels, I can't name them all, but Pickens Mather & Company owns a whole string of them, and Inter Lake Steamship Company is interlocked, and they are in and out all the time.

Q. I'm calling attention to the months in 1961. Your answer is yes, you did go to work for them? A. That is right.

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Q. We are referring in all of our questions, Mr. Witness, to these August, September and October months. You understand that? A. All right.

Q. Do you have the list of the Bolland-Cornelius ships that you worked on? A. Those names are used synonymously, and if you invoice one you are apt to get a check from the other. So, what you

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got on your records is immaterial and irrelevant.

Q. But you do have them, right? A. Yes, we have Bolland-Cornelius on some of these and American Steamship on the others.

Q. What is the name of the ship? A. The Skhoelkoph and the U. S. Gypsum is Bolland and Cornelius. That doesn't necessarily mean that you are going to get your ship from them.

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MARTIN F. SOELLNER:

Cross-Examination.

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Q. Do you have a labor contract with more than one union at your company? A. Yes, sir.

Q. Which unions? A. Well, sir, I have a labor contract with the AFL Machinists, which has expired, and we have an active contract with the Teamsters, 107.

Q. And in addition one with the Boilermakers? A. That's right, sir.

Q. Did the contract with the Machinists expire at the same time as the one with the Boilermakers? A. Yes, sir.

Q. Has an agreement been reached with either the Boilermakers or the Machinists as of this time? A. No, sir, they—there has been no resolved agreement.

Q. Would you please tell the Examiner what you meant by saying, "Since the 7th of August, 1961, there has been a gentleman's agreement between the company and the Union"? A. We've just been operating along on honoring the situation as it exists, status quo.

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Q. Is that what you mean by gentlemen's agreement. sir? A. That's right.

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LEROY GRAMBO was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

Trial Examiner: Give the reporter your name?

The Witness: My name is Leroy Grambo, G-r-a-m-b-o.

Direct Examination.

Q. (By Mr. Kossoff.) Did you—Would you state your address for the record, please? A. 9028 Revere Court, Munster, Indiana.

Q. And where do you work, what is your occupation? A. I'm assistant business manager and financial correspondent secretary of Local 374, Boilermakers Local.

Q. And how long have you been in that capacity? A. A little over twenty months.

Q. Did you participate in 1961 at the negotiating sessions with the American Shipbuilding Company? A. Yes.

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Q. And directing your attention to March 24th, 1961, did you participate in a dinner with representatives of American Shipbuilding Company? A. Yes, sir.

Mr. Cavanc: What was that date please?

Mr. Kossoff: March 24th, 1961.

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Did the question of negotiation come up at this meeting? A. Yes.

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Q. What was stated by the company in reference to this? A. While we were having lunch the subject of negotiations was brought up by the company and they expressed the desire to negotiate as early as possible before the expiration date of our contract, feeling that it would put them in a better position to bid on work to be put in the ship yards in their various docks.

Q. Did anyone reply to this by the Union? A. Yes.

Q. What was said, and who said it? A. The Union representative's reply to this statement by saying that they

would be very interested in getting together with the company at an early date, but in the next month or so, we were having a conference of the Marine Counsel in Long Beach, Californ[illegible] just prior to our convention, and at that time we exten[illegible]hem an invitation to join us there where we would be able to take and talk over the problems that exist.

Q. And did American Shipbuilding reply to this statement? A. I believe they said to the secretary that they were not sure if they could go out to the meeting.

Q. But they were invited to attend? A. Yes, they were.

Q. Did they attend the convention?

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A. Not to my knowledge.

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Q. All right, subsequently, did the Respondent's negotiating officials come together in the same room with the Union representatives? A. Yes.

Q. Did anyone from the Company at that time make a remark in reference—or similar to that made by Mr. Seldin as just described by you? A. Yes.

Mr. Cavano: Object until we place the date.

Mr. Kossoff: The date—

The Witness: About July 19th or 20th.

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Q. (By Mr. Kossoff.) What was stated at that time by company representatives, and who made the statement as

far as you can recall? A. As far as I can recall, Mr. Midnight pointed out to the bargaining committee that they were in a difficult situation because they did not have an agreement and whereby they couldn't take and go out and secure additional bids for work to be put into the yards.

Q. Did you make any statement in reply to this? A. Yes, I did.

Q. What did you say? A. I said that the Company had an agreement still in effect and there is work going on in the yards and that any work that would be brought into the yards, would be completed.

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HAMPARTZOOM B. JAMGOCHIAN was called as a witness by and on behalf of General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Give us the spelling of your name.

The Witness: The first name I'll spell for you, H-a-m-p-a-r-t-z-o-o-m, middle initial B., last name J-a-m-g-o-c-h-i-a-n.

Direct Examination

Q. (By Mr. Kossoff.) State your address on the record, sir? A. 4103 Parakeet, Toledo 12, Ohio.

Q. Sir, were you present at the negotiating sessions between American Shipbuilding Company and the group of eight Unions? A. Yes.

Q. This is in 1961. I am referring to. A. I would assume.

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Q. Were you present at every one of the sessions? A. Yes, I was.

Q. Did you have occasion at any of these sessions to make statements with reference to the Toledo yards? A. I don't quite follow you.

Q. Will you state for the record what your occupation was? A. Assistant business manager of Local 85, Toledo, Ohio.

Q. Is that the Boilermakers Local? A. That is correct.

Q. Did you have any occasion to make statements at any time of the negotiating sessions with reference to the question whether or not work could get out or not? A. You mean by the Company?

Q. Did you yourself make any statements whether or not the men would get any work out? A. Definitely, yes.

Q. When did this occur? A. On two or three occasions, and the—No, I would have to be honest with you about this. If you are asking when, you say when did this happen? As to my estimation, if you are asking for exact dates, I would be lying if I would even venture a guess, but I know that I had made statements on two or three occasions during our caucuses, and with the company present, and I have also made statements that the work would be done by the Boilermakers, and I would say I am

the representative of the Boilermakers on one or two occasions with the company personnel manager.

Q. What is the personnel manager's name? A. Mr. Gene Franz.

Q. And what were the general census of the statement you made to Mr. Franz? A. Primarily this, that as far as I was concerned, speaking for the representative of the

Boilermakers, that I could give them every assurance they had nothing to worry about insofar as any work that they could obtain that we would certainly put it out for them, period.

Q. Did you make that statement at the negotiating sessions also? A. Definitely. Not only in the sessions, but with the company and union sitting together, but with all the caucuses we had to tell our group in the caucuses primarily. That was our theme throughout, and we continued to work and we did. We discussed it when the company wasn't there and when it was.

Q. My question wasn't in reference to your personal caucuses but in reference to in front of the company. A. Yes.

HAMPARTZOOM B. JAMGOCHIAN:

Cross-Examination.

Q. (By Mr. Cavano.) Did you at any time throughout these negotiations—throughout these negotiating sessions say that you would not strike?

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A. Yes, sir, Mr. Cavano, I did, definitely.

Q Do you recall what you said? A. I—Speaking only for the Toledo yard at the time.

Q. This was at the sessions? A. At the sessions with the company, yes.

Q. Tell us— A. They are negotiating groups, Boilermakers and etc. had been bargained for in Toledo, that they would definitely be kept on the jobs. Any work that you had, you didn't have to have any hesitation about procuring same, that we would get it out, period.

Q. Did you ever at any time at the negotiating sessions say that you would not strike the American Shipbuilding Company?

Mr. Mamet: Objection to the question. If you mean you personally—Is that what you mean?

Mr. Cavano: Yes, you personally.

The Witness: Did you ask me—I'm not trying to stall you. I just want to understand the question. How do you mean personally?

May I ask a question, Mr. Examiner?

Trial Examiner: Yes.

The Witness: Because I'm not used to this type of procedure, it's generally off the cuff and not too important protocol. Is the answer to the question yes or no or—

Trial Examiner: That's a yes or no type question.

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The Witness:

A. Did I ever make the statement that I wouldn't strike the yards in Toledo, yes.

Q. (By Mr. Cavano.) Do you recall when you made that statement? A. No, I would have to be honest with you, I couldn't, but it was the first time, that is why I asked the Examiner, Mr. Cavano, whether or not this required a definite yes or no answer, because in several occasions three or four sessions, both in the caucases and with the company present, I told them that we wouldn't have to worry about the Toledo yards, they would definitely be kept on the job, and when I say that, that means I'm not going to put them out on strike.

Q. That is your explanation for answering the previous question in the affirmative? A. Yes.

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ALEX DALRYMPLE was recalled as a witness by and on behalf of General Counsel, and, having been first duly sworn, was examined and testified under Rule 43(b) as follows:

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Q. (By Mr. Mamet.) Now, we didn't go over your—What is the normal amount of a minimum crew that you carry through the summers, Mr. Dalrymple?

Mr. Cavano: Objection.

Trial Examiner: Why?

Mr. Cavano: They vary from year to year. If he asks how many in '61, '60, '59—

Trial Examiner: Objection overruled. You can clarify it. The witness is the general manager.

The Witness:

A. There is no fixed number. According to conditions, according to the demand for emergency service or also any important maintenance work. I think you have a chart belonging to me from the various years.

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Q. As a matter of fact, the word was around that you had

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shut down completely, wasn't it?

Mr. Cavano: Objection.

Trial Examiner: Well, I'll overrule that.

Mr. Cavano: Word around where, the City of Chicago?

Q. (By Mr. Mamet.) Within the trade, generally. A. Well, within the trade, that news passes around farther and faster than it does at a girl's koffee klatch.

Q. But the word that spread all over like the news of the girls' koffee klatch was, in the trade, that you had shut down? A. It wouldn't be referred to as Chicago, but to American Ship Yards on the Great Lakes.

Q. Had shut down? A. Yes.

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Q. Isn't it true, Mr. Dalrymple, that a week or two before you actually closed down you were beginning to put the cranes down, you were beginning to drain the tanks and beginning to move batteries and so forth, the men were doing this?

Mr. Cavano: I'm going to again object to the words close down.

Mr. Mamet: Apart from that word. I'll withdraw that word.

Q. (By Mr. Mamet.) When you started to do that, you started about two weeks before, didn't you? A. No.

Q. How long? A. Any units we are not using. Naturally you have surplus units when you hit a higher peak in the winter time. We started throwing them away just as part of maintenance like we do every summer.

Q. And you started that around the 1st or 2nd of August; is that right? A. It could happen before that, too.

Q. And you had them all stored away about by the end of

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the work day on Friday, August the 11th, didn't you? A. No.

Mr. Cavano: I object to this. Didn't have what stored away?

Trial Examiner: Overruled.

Q. (By Mr. Mamet.) What? A. Some of the machines were just sitting where the men left them.

Q. Mr. Dalrymple, what if anything did you do with the dock gates? A. The dock gates were already closed, if I recollect right.

Q. On the 11th? A. Yes. That was closed to keep out debris.

Q. You put the booms on horses, right? A. Yes, lowered them down on horses for safety.

Q. And the batteries came out of the trucks and everything, right?

Mr. Cavano: I object to the word everything.

The Witness:

A. Yes.

Q. All right. Now, calling your attention to the period of time that you have been the manager, have any of your people walked off the job and gone out and picketed and so forth except during the strike which occurred following the negotiating session?

Mr. Cavano: Objection.

Trial Examiner: Has he ever—Have they ever walked off, in what way?

Mr. Mamet: Well, I'm thinking in terms of what we would call wild cat strike.

The Witness:

A. We had a wild cat strike.

Trial Examiner: Overruled.

Q. (By Mr. Mamet.) Now, what you are talking about is what you referred to before apart from an incident in February of 1961, over the lunch hour, if you know what I am talking

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about? A. After the lunch hour.

Q. All right. During or after the lunch hour, apart from an incident in 1961, during or after the lunch hour, and not even calling that a wild cat, so you can answer the question, have you had any wild cat strikes?

Mr. Cavano: Well, I believe he said they did, and he stated the date as February 1st of '61.

Mr. Mamet: Well, I'm not going to argue. We are going to put a witness on.

Trial Examiner: If you are going to put a witness on—

Mr. Mamet: To this incident.

Trial Examiner: I don't know if this is through 43(b) called by the General Counsel on cross examination, and—

Mr. Mamet: It's the last question I have of this man, I think.

Trial Examiner: He said he had a wild cat, and you said aside from that did you have any others.

Mr. Mamet: He called this a wild cat. I'm saying aside from an incident, whatever you label it, in February of '61, which I will put a witness on for that incident.

Trial Examiner: Go ahead. In what period?

Mr. Mamet: From the time he had been plant manager or shop manager.

The Witness:

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A. Well, I got one in '61. I can't recall any other.

Q. To your knowledge, you can't recall any others? A. No, sir.

Q. The one in '61, this incident, in February '61, during or following a lunch period, is that what you are talking about? A. Following.

Q That is the one in February of '61 that you called a wild cat? A. Yes.

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STANLEY MIDNIGHT was recalled as a witness by and on behalf of General Counsel and, having been previously sworn, was examined and testified further as follows:

Trial Examiner: This witness was put on the stand by the company, as I recall, as one of its chief witnesses and was cross examined by attorney for the General Counsel and

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the union attorney earlier. Go ahead. This is a rebuttal witness, I take it?

Mr. Kossoff: That's right.

Trial Examiner: Will your examination be long?

Mr. Kossoff: It may take several minutes.

Trial Examiner: Do you expect to examine this witness, too?

Mr. Mamet: I don't know.

Trial Examiner: May I suggest that you confer and one attorney cross examine, and I don't want cumulative repetitive examination.

Mr. Kossoff: I'll defer to Mr. Mamet on the cross examination.

Trial Examiner: Are you calling this witness or is the Union calling it?

Mr. Kossoff: It's my witness, but you want us to confer.

Trial Examiner: If it's your witness, you better examine—.

Mr. Kossoff: I was just—

Trial Examiner: The responsibility for the presentation of this case is yours as the representative of the government.

Mr. Kossoff: That is the way I interpreted it, too.

Trial Examiner: It's not my suggestion that you turn the examination over to the Charging Party.

STANLEY A. MIDNIGHT:

Direct Examination.

Q. (By Mr. Kossoff.) Sir, did you do work on the ship

known as the Atlantic Dealer? A. Yes, sir.

Q. Where was this work done? A. In our Buffalo plant and in our Lorain plant.

Q. When was the work done in your Buffalo plant? A. Well, the ship was delivered in October of '61, so it would have been the previous summer. It must have been the summer of 1960.

Q. When you worked on it at your Buffalo plant? A. Yes, sir.

Q. And could you tell us what period of time you worked on it in the summer of 1960, for how long? A. No, sir, I don't remember the facts and details.

Q. I see. When did the vessel enter your Lorain yard? A. I don't remember.

Q. Was it in the year 1961? A. Oh, yes. As I said, we had it down at Lorain in the summer of '61. I don't remember just when it came in though.

Q. But you are sure it came in the year 1961? A. No. I think it was towed to our Lorain plant in the fall of 1960, around November, December, somewhere in there.

Q. For what purpose was it towed into the Lorain yard? A. To do work on it.

Q. What was the nature of the work, sir? A. To jumboize it.

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Q. Will you explain to the record what the process of jumboizing is?

A. It's the process of taking a ship such as a T-3 tanker and making it longer and making it wider and we may or may not change the depth.

Q. (By Mr. Kossoff.) And how long does such a process take? A. Well, that would depend on a number of situations. If we had all this material on hand and all the drawings made, it would take so long, and on the other hand, if we didn't, it would take longer and it depends on whether we are going to put a foreign built mid body into the thing or whether we are going to build it ourselves.

Q. Would you tell the Examiner the nature of the conversion

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job—the nature of the jumboizing job on this particular vessel? A. Yes. The ship was delivered to us by the owner, at which time we started to do preliminary work as much as we could, because we didn't have drawings or material available immediately, and in the meantime we ordered a mid body from Western Europe, and that would be built and towed over to this country, and I believe it arrived in June sometime in 1961. In the meantime we were doing miscellaneous things on the ship, because most of the work had to be done after the mid body arrived. So, then, from the time the mid body arrived until we delivered in October, 1961.

Q. Did the vessel Atlantic Dealer remain in your dock during the period that the mid body was ordered abroad? A. No, it wasn't put in the dock, I don't believe, in Lorain until after we got the mid—until about the time we ordered the mid body.

Q. It was at the Buffalo dock when the mid body was ordered, wasn't it? A. It was out of Buffalo. I don't recall how long.

Q. But from Buffalo it went directly to Lorain; isn't that correct? A. Yes, sir.

Q. And did—The ship did not sail for normal voyages during the period between Buffalo and Lorain?

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A. That is correct.

Q. And it was quite apparent when the Atlantic Dealer job was taken, that it was going to be a large job; isn't that correct? A. Yes.

Q. It was quite apparent that it would not be finished until sometime in October, 1961? A. Our contract delivery date on it was April 15th.

Q. Of what year? A. 1961.

Q. And when did it become apparent that you couldn't complete it by April 15th, 1961? A. About the fall of 1960.

Q And in the fall of 1960, it was in Buffalo; is that correct? A. Yes, sir.

Q. And at the time that it was brought into Lorain dock, it was quite apparent that the work could not be completed by April of 1961; is that correct? A. Yes, sir.

Q. And is it not a fact, sir, that it was accepted by both the company and the vessel owner that the ship would not be completed until sometime in either September or October of 1961? A. I don't know what you mean "accepted".

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Trial Examiner: Understood.

The Witness: As we went along with the job it became apparent that it wasn't going to be finished early, yes. In other words, we were supposed to deliver the vessel in April, and for various delays—the steering gear delayed us, and other things, there were delays on the thing.

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A. That fall of 1960, I said it was clear that it could not be finished by April 15th.

Q That is correct, and you also testified that the delivery date was set to be sometime in September or October of 1961; is that correct? A. Yes.

Q. But if the vessel was taken from Buffalo to Lorain? A. Yes.

Q. But yet you did not inform the owners that there would be a—

Trial Examiner: Did you finish the question?

Q. (By Mr. Kossoff.) But you did not inform the owners of the fact that there might be a good chance that it wouldn't be completed in view of the fact that there was a labor dispute possible? A. Can I answer now?

Q. Yes. A. In November, December, October, somewhere, of 1960, we took the vessel from Buffalo to Lorain. At that time we had no idea that—how long it was going to be when the ship was finished.

Q. Sir, you have already testified that before you took the vessel into Lorain it was clear that the vessel could not be completed by April of 1961? A. That is right, but we didn't know when it was going to be

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finished. We didn't know if it would be July or August or September or when. In fact, we thought, I think, that it could be finished before August 1st.

Trial Examiner: When did you take the Atlantic Dealer from Buffalo to Lorain?

The Witness: Around, I would say, November, 1960.

Trial Examiner: November, 1960. And when did your labor contract expire?

The Witness: On August 1st, 1961.

Q. (By Mr. Kossoff.) That was August 1st, 1961; is that correct? A. Yes, sir.

Q. Then, when you transferred the vessel from Buffalo to Lorain, it was a distinct possibility that the job might not be completed before August or September or even October of 1961; is that correct? A. I would say that is right, yes, sir.

Q. And yet did you not inform the owners of the fact that they might be confronted by a strike or walk out of men during the period of August or September? A. No, I

didn't see any need for advising them. We had the contract to do. There was nothing that could be done. We had signed a contract to do this work and the ship had to be done. They couldn't take it to anybody else.

Q. But it didn't have to be taken until the work in Lorain

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began, did they? A. Yes, that was the only place we would do it. The dry dock at Toledo, for example, was not long enough. The dry dock in Buffalo was not long enough.

Q. Would you have been hurt by a strike on this vessel as far as your work on this vessel was concerned? A. It was very possible, yes.

Q. Nevertheless the men continued to work on this vessel without interruption at any time? A. Yes, sir.

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DAVID O. PETERSON was called as a witness by and on behalf of General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Your full name, sir?

The Witness: David O. Peterson.

Direct Examination.

Q. (By Mr. Kossoff.) Will you state for the record your address, sir?

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A. The office?

Q Your home address, either one. A. 8733 Highland Street, Highland, Indiana.

Q. What is your job? A. Business manager of the Boilermakers Local 374 with the offices located in Hammond, Indiana.

Q. How long have you served in that capacity? A. About nineteen months.

Q. And were you present at the dinner with representatives of the Company in March of 1961? A. Yes.

Q. Do you recall who was present for the Company and who was present for the Union at this meeting? A. Yes. There was Mr. Midnight of the American Ship, Mr. Cavano of the American Ship, Mr. Pelz of the International of the Boilermakers, Mr. Dalrymple of the American Ship, Mr. Leroy Grambo, the assistant business manager of Local 374, and myself. I believe that was it.

Q. During this meeting did anyone from Respondent make any statement in reference to the question of beginning early negotiations? A. Yes, we all talked about it.

Q. Would you tell —Just for the record, sir, what was said about that subject? A. You see—

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Q. What was said in reference to subject of early negotiations by both the Company and the Union? A. The Company and the Union were both in accordance starting early negotiations.

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DAVID O. PETERSON:

Direct Examination.

Q. (By Mr. Mamet.) Calling your attention to 1958, did you have any official capacity with Local 374? A. Previous to 1958?

Q. Let's say on August—during the month of August, 1958? A. The month of August, 1958, I was assistant business manager and treasurer of Local 374.

Q. Do you know on or about what day did the strike occur in Chicago on American Ship?

Trial Examiner: This in '58?

Mr. Mamet: '58.

The Witness:

A. It was in August, about the middle of August. I believe it was the 14th, I believe.

Q. And do you know of your own knowledge if the Toledo. Lorain and Buffalo yards went out about the 1st of August? A. They went out two weeks previous to the South Chicago yard.

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Q (By Mr. Mamet.) Explain why, if you know, why you went out two weeks after the other yards in Chicago? A. The differential, you mean?

Q. In the time. A. There was some work in the South Chicago yard, and I understand it was government work, and the Boilermakers were not going out until this work was completed.

Q. And who was the business manager of the yard at the time? A. William Manes.

Q. Now, was Mr. Curtin of any position? A. Mr. Curtin at that time was financial corresponding secretary and assistant business manager.

Q. Is Mr. Curtin living today? A. Mr. Curtin passed away November 20th of 1960.

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Q. Is Mr. Manes in office anymore? A. No.

Q. As a matter of fact, you are his successor, are you not? A. Yes.

Q. Now, calling your attention to the meetings of your membership in the months of June, July, and August of 1961, in Chicago, as business manager of Local 374, did you take any position relative to whether or not you were going to strike or what occurred at your meetings relative to that, did you take any position with your people? A. In 1960?

Q. 1, 1961. A. 1961?

Q. Yes. A. We didn't intend to strike. It was brought up at the meetings. We had—Well, we had a meeting for each proposal that was presented by the Company, and it was brought up at those meetings that there would not be a strike. We all had the understanding that there would not be a strike.

Q. And this was communicated from the floor of the meeting to the membership? A. Absolutely.

Q. And to your knowledge as the head of the organization, was your membership accepting this and going along with it? A. They certainly did.

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Q. Now, calling your attention, Mr. Witness, to February of 1961, did you have occasion to have a problem with the American Shipbuilding Company relative to Mr. Clietas Walker? A. Yes.

Q. Will you describe that problem, please? A. Clietas Walker is a member of the Boilermakers, Local 374. He had been terminated by American Ship, South Chicago

yard. We believe that he was—you know, there is a previous answer to this thing. We believe that he was discharged in violation of our agreement.

Trial Examiner: When was that, what year?

Mr. Mamet: February, '61.

Trial Examiner: Go ahead.

Mr. Mamet: I'm just covering this one incident.

Trial Examiner: No, I'm telling him to go ahead.

Q. (By Mr. Mamet) Well, just explain briefly, if you can, the Clietas Walker problem. Excuse me, would you please explain the Clietas Walker problem, if you would, in a sentence or two, what was the nature of the problem? A. He had been off since—I don't remember the period of time, but when he returned to work he was given a discharge slip as being unsuitable for work. I don't know how far you want to go with this.

Q. Go on, then what happened? A. Well, he reported to the Union Hall in Hammond. At the

time Bill Curtin was in the office. Bill Curtin contacted the American Ship, South Chicago Office. Some arrangement was made whereby Mr. Walker was supposed to report back to the yard, and I believe Mr. Dalrymple, or it may have been Mr. Crawford, I'm not sure which, he arrived at the yard at about noon and he went upstairs into the change house where several of the Boilermakers—well, I say several, maybe fifty. I just use that as a figure. Perhaps fifty Boilermakers were eating lunch. These Boilermakers asked Walker what happened. He said he was fired. So, it was like setting off a firecracker with this group of Boilermakers. They wanted an answer why the man was fired.

Q. Now, this was on their lunch period? A. This was during the lunch period.

Q. Not all of the Boilermakers—Was this a lunch room? A. It was what you call combination change house and lunch room.

Q. Not all the Boilermakers were in the luneh room at this time? A. No, they weren't.

Q. And they were discussing this Walker incident, is that right, those that were in there? A. Yes, they were.

Q. This discussion continued beyond the lunch period, did it not?

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A. Yes, it continued beyond the lunch period.

Q. Now, thereafter, did not the Company lay off all the people, all the Boilermakers irrespective of whether they were in the lunch room or not, for a period of five days, which was later changed to four days by the Company?

• • • • •

Q. (By Mr. Mamet.) Is this the incident that Mr. Dalrymple was talking about? A. Yes, it is.

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DAVID O. PETERSON:

Cross-Examination.

Q. (By Mr. Cavano.) Mr. Peterson, would you be kind enough to tell us whether or not the members of your Local, Local 374, who are employed by the American Shipbuilding Company at the South Chicago yard, whether or not they took a strike vote?

• • • • •

A. We—

Q. (By Mr. Cavano.) At any time between the day of June 6th. 1961, and August the 1st, 1961? A. Between June 6th, 1961, and August 1st, 1961, no.

Q. They did not have a meeting, they did not take a strike vote? A. They did not.

Q. Did your membership ever take a strike vote as far as the American Shipbuilding Company is concerned, in 1961? A. Not in 1961, no, sir.

Q. It never took a strike vote in 1961? A. No, sir.

GENERAL COUNSEL'S EXHIBIT NO. 2

The American Ship Building Co.

Departmental Release

Name P. Miller	Left
Check No. 400	Voluntarily
Department Boilermaker	Discharged
Occupation	Laid Off X
	Transferred

Reason for Release Because of the labor dispute which has been unresolved since 8/1/61, you are laid off until further notice. Signed Manager

Date 8/11/61

GENERAL COUNSEL'S EXHIBIT NO. 7

THE PIONEER STEAMSHIP CO.

1508 Rockerfeller Bldg . Cleveland 13, Ohio

Telephone
MAin 1-7135

July 31, 1961

American Ship Building Co.
Foot of West 54th St., N. W.
Cleveland 2, Ohio

Attn. Mr. Gordon Stafford

Dear Sir:

In response to your call of today regarding the Pioneer Challenger, she must definitely be docked immediately; however, in view of your current unsettled labor conditions, we do not feel that it would be advisable to use your facilities. We have made other arrangements.

Sincerely yours,

The Pioneer Steamship Co.
/s/ C. L. Hutchinson
Vice President

CLH:w

GENERAL COUNSEL'S EXHIBIT NO. 8

THE CLEVELAND-CLIFF'S IRON COMPANY

Offices 14th Floor Union Commerce Building

Cleveland 14, Ohio

Marine Department

W. F. Rapprich
Manager

J. L. Horton
Assistant Manager

S. A. Croley

August 11, 1961

Mr. Gordon Stafford,
American Ship Building Co.,
West 54th Street,
Cleveland, Ohio

Dear Sir:

It is our understanding that you are having labor troubles at the ship yard. Our Steamer Ishpeming ...s arrived at Lorain for extensive repairs, and we wish that you would do nothing whatsoever until your labor situation is corrected and we give you authority to proceed with the work.

Very truly yours,

Wm. F. Rappisch
Manager Marine Department

RESPONDENT'S EXHIBIT NO. 4

Western Union.

Telegram.

1961 Aug. 2

Charles Cavano,
National City Bank Bldg., Cleve.

Following wire sent to Commissioner Seldin: "In Furtherance of your request that the Iron Shipbuilders International Marine Council exert its efforts to prevent any precipitous strike action by our members employed by the American Shipbuilding Company at least pending a meeting you contemplate convening the early part of next week, be advised I will arrive in Cleveland on United Airlines Flt. 559, Monday, August 7 at 5:30 P. M. and thereafter thru Wednesday, be immediately available at the Hotel Sheraton-Cleveland. Copies of this telegram being sent to appropriate local unions and representatives of our International Brotherhood and Representatives of the American Shipbuilding Company, anticipating complete compliance with your request."

A. F. Young.

Rec'd 2:15 P. M. 8/2/61.

IR-225-62
Chicago, Ill.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD,
Division of Trial Examiners.

Washington, D. C.

The American Ship Building Company and Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.	Case No. 13-CA-4504

Sinclair Kossoff, Esq., for the General Counsel.

Charles Cavano, Esq., of Cleveland, Ohio, for the Respondent.

Bernard M. Mamet, Esq., of Chicago, Ill., for the Charging Party.

Before: George J. Bott, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER.

Statement of the Case.

Upon a charge of unfair labor practices duly filed on October 24, 1961, against The American Ship Building Company, herein called the Company or Respondent, the General Counsel of the National Labor Relations Board issued a Complaint and Notice of Hearing dated December 22, 1961, alleging that Respondent had violated Section 8(a)(1), (3), and (5) of the Act. An answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices was filed by Respondent and a hearing was held before me in Chicago, Illinois, on February 14, 15, and 16, 1962. All parties were represented at the hearing and have filed briefs which I have considered.

Upon the entire record in the case and from an observation of the witnesses, I make the following:

Findings of Fact.

I. Respondent's business.

The complaint alleged and Respondent admitted that:

(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New Jersey.

(b) At all times material herein, Respondent has been engaged in the manufacture, repair and conversion of steamships and operates shipyards in Buffalo, New York; Lorain and Toledo, Ohio; and, South Chicago, Illinois.

(c) During the past year, Respondent, in the course and conduct of its business operations, performed services valued in excess of $100,000 at each of its shipyards in the

States of New York, Illinois, and Ohio for various ship owners and steamship companies operating on the Great Lakes.

(d) During the past year, Respondent, in the course and conduct of its business operations, purchased, transferred and received at its Lorain, Ohio, shipyard, steel, ship parts, and other materials valued in excess of $100,000, which materials were transported to said shipyard directly from States of the United States other than the State of Ohio.

(e) During the past year, Respondent, in the course and conduct of its business operations, purchased, transferred, and received at its South Chicago, Illinois, shipyard, steel, ship parts, and other materials valued in excess of $100,000, which materials were transported to said shipyard directly from States of the United States other than the State of Illinois and/or in foreign commerce directly from foreign countries.

Respondent concedes, and I find, that it is an Employer engaged in commerce within the meaning of the Act.

II. The labor organizations involved.

The complaint alleged, Respondent admitted, and I find that each of the following named organizations is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers,

United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U. S. & Canada.

United Brotherhood of Carpenters and Joiners of America,

International Brotherhood of Electrical Workers,

Brotherhood of Painters, Decorators & Paperhangers of America,

International Brotherhood of Firemen and Oilers,

International Union of Operating Engineers,

Patternmakers League of North America;

all of which unions are affiliated with the AFL-CIO, and are hereinafter referred to as the Unions.

International Association of Machinists, AFL-CIO, hereinafter referred to as Machinists Union.

III. The alleged unfair labor practices.

A. The facts.

1. Negotiations prior to the layoff of employees on August 11, 1961.

Since as early as 1952, Respondent and a group of eight craft unions (called the Unions herein) have been parties to a collective bargaining contract which expired on August 1, 1961.[1] In May of 1961, the Unions and Respondent exchanged contract change proposals by mail and subsequently the first negotiating session was arranged for June 6, 1961, at Cleveland, Ohio.

At the first negotiating session the Unions selected Charles Alexander, Jr., representative of the International Boilermakers Union, as chief negotiator and spokesman for all of them. Charles Cavano, Respondent's attorney, and Stanley A. Midnight, Respondent's executive vice president, were chief spokesmen for the Company. In addition, representatives of the various local unions as well as the Com-

1. The agreement was with the International Unions, not the Locals. Respondent also had an agreement with the International Association of Machinists which expired on August 1, 1961, but which was negotiated separately.

pany's plant manager were present. As a general rule the same representatives were present at all subsequent bargaining meetings.

At the first meeting of the parties on June 6, 1961, Mr. Midnight spoke about Respondent's poor competitive position in the industry and proposed that Respondent keep its rates of wages constant until such time as its competitors' rates rose. He pointed out that conditions in the Great Lakes area were generally poor for all shipbuilders because of various economic factors, and that, in particular, one competitor company had wage rates as much as 42c per hour less than Respondent.[2] During the meeting, the Unions' chief negotiator stated that he understood that in the past there "seemed to have been a strike . . . during every negotiation . . ." but it was his hope that the parties could reach agreement on this occasion without a strike. He added that he disliked strikes and would do everything he could to prevent a strike and complete negotiations amicably.[3] Nothing of major importance was accomplished in the June 6 meeting, and the parties again met on June 7 and 8 without success.

The parties met again on June 19, 20, 21, 22, and 23, but only minor changes in contract language were agreed to. During the June 20 meeting the Unions left their wage demand open but suggested the discussion of fringe benefits such as pensions, vacations, guaranteed holidays and the like. The Company computed these requested fringe bene-

2. Months before the labor agreement expired, Mr. Alexander, at Respondent's request, had discussed with Respondent's representatives the possibility of an early opening of the contract. In these conversations the general economic conditions in the industry were mentioned.

3. It appears that a strike occurred in all negotiations beginning in 1952, followed by 1953, 1955, 1956, and 1958. The strikes lasted for about 3 weeks at a time, with the exception of the 1958 strike which lasted about 10. There was also a stoppage in 1961 over a grievance.

fits at about 28 cents per hour and the Unions at about 20 cents. The Unions agreed to submit revised proposals to the Company and did so in time for a bargaining session held on July 5. On July 5 and 6 the parties met again. The Union had revised downward some of its requests for fringe benefits, but it requested that 10 cents per hour be set aside for pensions where no specific cost had been suggested before. The Unions still made no specific demand for wages preferring to negotiate the other matters first. The parties met again on July 6 without coming to agreement on economic issues of any substance, and Respondent suggested that the services of the Federal Mediation and Conciliation Service be utilized if the parties hoped to reach agreement before the contract's expiration date. Cavano called the Conciliation Service and a meeting was arranged for July 19.

During the July 19 meeting at Conciliation the Unions revealed their demand for a 20 cents per hour across the board increase. Other economic issues remained in the picture and although some progress was made on certain sections of the agreement no appreciable progress appeared with respect to the economic matters. At this session the Unions proposed a 6-month extension of the agreement which contained a no-strike clause. Respondent refused the extension on the ground that the contract would then expire in its busiest season of the year.

During a meeting on July 20 the parties discussed wages and other items. Although certain matters were resolved, the important economic issues, including wages, remained a stumbling block. During this meeting, while discussing wages, Alexander stated that the Company was "crying" about not being able to afford a wage increase and that it had used the same argument in 1958, but, after a 10- or 12-week strike, the Company granted an 8 cents per hour in-

crease in each year of a 3-year agreement and yet was not forced out of business. Alexander added, however, that the Unions did not wish to strike and urged further negotiations.

The parties met again on July 28, 29, and 31. By July 31, the last day of the existing contract, the issues had been narrowed to five or six but they were primarily monetary or fringe benefits.

The Company presented two proposals to the Unions covering the unresolved issues, but the Unions rejected the proposals. The Unions made a counterproposal to Respondent. First, they suggested a 1-year agreement covering their wage and fringe benefit proposals which included, at this point in the negotiations, a 9 cents per hour increase and 5 cents for a pension plan, and secondly, proposed a 6-month extension of the existing contract. Respondent rejected the Unions' proposals. The Company asked that its proposals be submitted to the employees for a vote and the Unions agreed to do so, but stated that they would not recommend adoption. Alexander asked that the labor agreement be extended until a new agreement was reached the effective date to be retroactive to August 1, but this was refused by Respondent. Alexander then requested that the agreement be extended long enough to take Respondent's proposals back to the membership and Respondent agreed to do so.

At the close of the July 31 meeting, Respondent asked the Unions if they intended to close down the yards the next morning but Alexander replied that the Unions did not intend to and were not going to strike. On August 8, 1961, the Unions told the Company that the employees had "overwhelmingly" rejected the Company's August 1 offer. Respondent asked why the Unions had not struck and Alexander told Respondent that the Unions had consistently stated that they did not intend to.

On August 9 the parties met again. Respondent offered the Unions a 3-year agreement with a package increase of 5 cents each year, which the Unions could divide in any way they wished, for pensions, group hospitalization, or a wage increase in the respective years. The Unions refused to take the offer back to the membership and made no counter-proposal. Plans for another meeting seemed up in the air but it is Alexander's recollection that the meeting was adjourned with the understanding that ". . . the Conciliator would call the next meeting at the time that he thought proper."

2. The layoff of August 11, 1961.

When the August 9 bargaining session at which the Unions had rejected the Company's offer adjourned, Respondent's executive vice president, Stanley Midnight, called a meeting of Respondent's plant managers and Cavano to determine what course of action Respondent would take. The meeting of officials occurred on August 10 and it was decided to completely shut down the Chicago yard and lay off all but two employees at Toledo. At Buffalo the yard was completing some miscellaneous jobs and there were about 50 men employed. These men were gradually laid off as the work was completed. At Lorain Respondent was working on a large vessel, the "Atlantic Dealer", and Respondent retained a comparatively large force to complete the job. Respondent, however, gradually reduced the force at Lorain as it completed the work on the vessel.

Pursuant to the discussions and plan evolved at the above meeting of officials, Respondent took action of August 11. On that date all South Chicago and Toledo personnel in the bargaining unit, as well as some from Buffalo, were issued a layoff notice which stated, "Because of the labor dispute

which has been unresolved since August 1, 1961, you are laid off until further notice."

At the August 10 meeting of company officials where the layoff was planned, Respondent decided on the precise language it would use in the layoff notices which it determined would have the result of depriving laid-off employees of unemployment compensation. In Illinois, for example, Respondent notified the Division of Unemployment Compensation that the South Chicago layoffs were due to a labor dispute. Attorney Cavano testified that he knew and intended that such notice would deprive the employees of compensation under Illinois law, and they subsequently were so disqualified. In Ohio and New York, the procedure is different. When employees file for benefits the employer is notified and at that time may protest an allowance. Respondent did protest the New York and Ohio claim and made the determination to do so at the August 10 meeting.

3. Negotiations after the August 11 layoff; execution of a new labor agreement on October 27, 1961.

The parties met again on August 19 and 20 at the Conciliation Service. The Unions asked for a 2-year contract costing about 10 cents each year, and the Company offered a 3-year agreement costing 5 cents the first year, 8 cents the second and about 2 cents the third. The Unions rejected the Company's proposal; but continued to bargain. Finally, the parties broke off the session because they had become deadlocked on the effective date of the agreement, the Unions insisting on date of execution, and Respondent on August 1.

At a session held on August 28 at Conciliation, where the parties did not meet face-to-face but exchanged views through the conciliators, the Unions rejected a company proposal for a 1-year agreement costing about 7 cents with

an August 1 expiration date. The next day the parties met again and Respondent made a proposal for a 2-year agreement, expiring August 1, 1963, and providing for 5 cents in pensions the first year; 4 cents for health and welfare 6 months later; and 5 cents for a wage increase at the beginning of the second year. This proposal was put in writing for presentation to the membership.

The various locals voted on the Company's proposal and a majority rejected it with the stipulation that it would be acceptable if the expiration date coincided with the date of execution and hospitalization benefits were altered. At a meeting on September 18, Respondent was notified of the rejection. At this meeting, Mr. A. F. Young, representing the International Boilermakers Union, told Respondent that the Unions would do all "in their power" to secure unemployment compensation benefits for the employees who had been laid off during the bargaining.

The last of the bargaining meetings took place on October 20, 21, and 22. The parties disposed of the "effective date" problem by agreeing to an August 15 expiration date, and also settled the hospitalization issue. The Unions then insisted, and the Company agreed to withdraw its protests to unemployment compensation in New York and Ohio, and to do whatever possible to aid Illinois employees to get compensation. The final agreement was signed on October 27, 1961, for a term of 2 years.

4. The issues and contentions.

The General Counsel contends that Respondent violated Section 8(a)(1), (3), and (5) of the Act by laying off and locking out its employees[4] on August 11, 1961, for the pur-

4. The complaint covers only the layoff of employees at South Chicago and no other yard. The charge, filed by the local union, not the International, related to the South Chicago yard only. No charges were filed by other locals.

pose of coercing them and the Unions to abandon the Unions' contract demands and to accept instead those terms offered by the Company. He contends further, that the notification to the [illegible]is Department of Labor that employees were laid off because of a "labor dispute," designed as it was to deprive them of compensation, was an additional violation of the Act.

Respondent contends, in brief, that it was confronted with the threat of a strike or prolongation of bargaining until a ship was in the docks (at which time a strike would occur); that no work was on hand and none was anticipated since customers were refusing to send work in; that an impasse had been reached in bargaining on August 10; and that, therefore, under such circumstances, the Respondent had a right to curtail operations before the precise moment when a strike occurred. With respect to the denial of unemployment benefits, Respondent urges that: "If the employees were to be laid off because of lack of work, Respondent, in effect, would be financing the labor dispute, in that employees would collect unemployment benefits up to 26 weeks, the cost of the premiums being borne by Respondent, alone, and this would extend the bargaining into the winter months, which it was apparent to Respondent the Unions were trying very hard to do."[5]

General Counsel, while not admitting Respondent's conclusions even if its premises were conceded, denies the imminence of a strike; contends that there was no economic justification for defensive action by Respondent; and urges that no impasse was ever reached in bargaining. All these contentions require additional findings as follows:

5. Respondent's brief.

5. The Company's belief in the imminence of a strike.

By August 10 the parties had met at least a dozen times in long bargaining sessions, which sometimes lasted into the early hours of the following morning, but were still far apart on monetary items and had no agreement about the term, or effective date of the agreement. At the last session before the layoff the Unions rejected a new company proposal, refused to take it to the membership and made no counteroffer. Further meetings were to be called when the Conciliator "thought proper." Earlier, sometime between the expiration of the old agreement and the August 9 meeting, the employees had overwhelmingly rejected the Respondent's offer of July 31. The record also shows a history of strikes at each contract negotiations since 1952, and strike votes taken by the locals during the 1961 bargaining. These facts alone could have led Respondent to reasonably believe that a strike would occur at any time after August 10, 1961.

On the other hand, at the first bargaining session the Unions' chief negotiator, Alexander, stated that although there had been strikes in the past, it was his sincere hope that the parties could reach an agreement without a strike in the current bargaining. At subsequent meetings he made similar statements. For example, the Company emphasized during meetings in July that it wanted to reach an agreement before contract expiration in order to be able to bid on work. Alexander assured the Company that it could bid, for the Unions did not intend to strike. Francis De Jac, representing the Buffalo Local of the Boilermakers Union told the Company it could take work and his men would complete it. Grambo and Jamgochian, local business rep-

resentatives of the Boilermakers at the South Chicago and Toledo yards, respectively, also assured the Company that the men would complete any work the Company was able to get. Alexander repeated his assurance that the men did not intend to strike on a number of other occasions prior to the layoff.

In addition to the Unions' oral assurance to Respondent that no strike was intended on August 11, certain other Unions' conduct has a bearing on Respondent's claim that it believed a strike would occur. Although the labor agreement expired on July 31, the men worked at all the yards without interfering with the Respondent's operation in any way until the layoff of August 11. Important work on the vessel "Atlantic Dealer" was being done at Respondent's Lorain yard during the negotiations, and hundreds of employees continued to work on this job without interruption, even though a strike at the yard would have injured Respondent. Similarly, at Buffalo, where a certain amount of miscellaneous work continued, the men continued to work while there was work in the yard.

Moreover, Respondent never asked the Unions for assurance that the men would not strike, nor did it ask for reasonable notice in the case of a strike. The Company never asked for assurance that any work in progress would be completed. The Unions, however, twice offered to extend the contract for 6 months, and when, on July 31, the second offer was refused, proposed that the existing contract be extended indefinitely until a new agreement was reached, the effective date of any agreement to be retroactive to August 1. This proposal was also turned down.

On the basis of the above facts alone no one can say with any certainty, long after the layoff of August 11, that a

strike actually was impending on that date or that it would have occurred when a vessel was brought into Respondent's yards. On the other hand, neither can I find, on the basis of the facts set forth, even without reference to the nature of Respondent's business operations, that Respondent did not actually believe that a strike might immediately occur, or occur if a vessel were in the yard. The fact that a strike did not take place cannot be of great significance in retrospect because the layoff and closing of the yards may have diverted the normal flow of events. On the Unions' side we have principally the assurances of peace given by Alexander and other representatives.[6] I do not think the offer to extend the agreement for 6 months adds much weight to the assurances for it would permit the contract to expire during Respondent's busy season, and at an ideal time for the Unions. Similarly, an indefinite extension was only part of the strategy of bargaining for Respondent would have no firm agreement during the time. Moreover, Respondent's rejection of an indefinite extension of the agreement during bargaining is consonant with a desire to get an immediate agreement on more favorable terms and not inconsistent with an honest belief that it would be confronted with a strike when the situation was ripe. An indefinite extension would be an uneasy peace at best.

Despite Alexander's assurances, we have on the Company's side of the ledger, as set out above, the long history of strikes, the gulf between the parties, and the apparent impasse after exhaustive attempts with the aid of Federal Me-

6. Despite Alexander's assurances that the Unions did not intend to strike, he never said, as no union representative could, that the men would not strike if necessary. Moreover, he did not appear overly impressed with Respondent's plea regarding economics, for in the July 20 meeting, as set forth above, he referred to the 8-cent increase granted after an earlier strike in spite of the Company's assertion then that it was unable to afford it.

diation and Conciliation to reach agreement. When these facts are viewed in the light of Respondent's operations they lead me to conclude that when Respondent laid off its employees after the August 10 bargaining meeting it did so in the belief that a strike would occur then or at such time as a vessel was docked at one of its yards.

Respondent's busy season is in the winter months when the vessels which sail the Lakes are laid up because of the weather. Emergency work does occur during the summer months, and Respondent usually kept "nucleus" crews in its yards who would, in the absence of customer work, perform maintenance work. The work situation in its yards on August 11 was as follows:

At Lorain a large ship was in the dock that had been under construction for a year before the agreement expired. The men working on this vessel were gradually laid off as the work progressed and the ship finally left the yard. At Chicago and Toledo, no vessels were in the yards and the nucleus crews doing maintenance work were laid off. At Buffalo, no ship was in the yard and employees yere doing miscellaneous work. They too were gradually laid off. Mr. Midnight testified that if a vessel were brought into the yard there was a real possibility of it being tied up in the event of a strike. He recounted an incident occurring in the 1955 negotiations where a valuable vessel was tied up and unable to sail because caught in the Respondent's dock during the strike of that year. He testified that he was motivated in part in closing the yard because of a fear of such incidents.[7] I credit Midnight's testimony and find that Respondent rea-

7. He also testified that Respondent's customers also were aware of such incidents and possibilities, and this caused a diminution of business during the 1961 negotiations. This subject will be discussed below.

sonably believed that a strike was possible on August 11, or thereafter, if ships were put into the Respondent's docks.

6. Lack of work at Respondent's yards in the summer of 1961 and the reasons therefor.

Midnight, in explaining the Respondent's layoff of August 11, testified that there was at the time practically no work at the South Chicago, Toledo, and Buffalo yards. He stated that the Company in the past had maintained a nucleus crew in the summer months so that it could handle emergency work as it arose. He added that the Respondent did not keep a nucleus crew on just for maintenance work in the absence of emergency work for there was always in the past some amount of productive work. In August 1961, however, according to Midnight, the situation in the yards was different for Respondent found, after reviewing the situation, that it "had no possibility of any work in our Toledo, Chicago and Buffalo plants." Midnight based his conclusion, he said, on the fact that customers, because of newspaper reports about the dispute, were continually calling him to inquire about the status of the labor negotiations. He considered negotiations to be at a "stalemate" and felt that customers would not risk bringing their ships into Respondent's yards. He stated, however, that yard managers were instructed to take what work they could get and that Respondent did not refuse work offered it by ship owners.

With respect to Midnight's contention that there was no work at all in the Chicago yard when the men were laid off the record shows that, at least for the last 17 years, no employee had been laid off in the summer months but were retained to do maintenance and emergency work. Although the Respondent frequently lost money by keeping a nucleus crew employed during its slack season, Yard Manager Dalrymple explained, ". . . if you want to (get) work you have

got to give some service irrespective of what it costs. You must keep some men around you. Otherwise when it comes to big jobs in the winter here, you're out of luck." Midnight also stated that Respondent lost money in the summer months but maintained a crew for emergency repair work to satisfy customers and keep their good will. On the other hand, both he and Dalrymple testified without contradiction that there was ". . . a little more work . . ." in the Chicago yard in prior years. No records were produced by either side to support or impeach this testimony but the record does show from daily labor reports in evidence that the last ship in the Chicago docks for productive work prior to August 11 was the "Zanzibar" on July 19. I find, in accordance with Dalrymple's testimony, that work requirements were "a little bit better in 1960 than . . . in 1961 . . ."[8] Immediately after the dispute was settled and a new contract executed in October 1961, Respondent recalled its minimum nucleus crew to the Chicago yard to stand by for whatever emergency jobs might arise. In addition, certain employees in the group picked up at the same maintenance work they had been doing prior to the layoff. On the basis of the above facts with respect to summer work, I find that, in all probability, Respondent would have kept the same nucleus crew in the summor of 1961 as it had in prior years, despite the fact that business was "a little" worse in 1961, if it had not been for the fact that a new labor agreement had not been signed. This does not fully answer the question about Respondent's motivation, however, for Respondent also argues, in addition, that there was no likelihood of future business while it had no firm labor contract because customers would not risk tieing up their ships in a yard

8. Employee Ferry, called by General Counsel, admitted that there was no productive work in the Chicago yard in the summer of 1961 but such was not true in 1959 and 1960.

which might be struck. The evidence on this issue is as follows:

Although Midnight testified that customers were "continually" calling him about the labor negotiations he was able to remember the name of only one such customer, and could not recall the date of that call. On the other hand, it appears from his testimony that, normally, calls for emergency repairs would go directly to the local yard manager.

Dalrymple, manager of the South Chicago yard which was completely shut down on August 11, testified that he had no telephone calls for emergency repair work in August 1961. He admitted, however, that the word had spread "within (the) trade . . . faster than it does at a girl's koffee klatch . . ." that "American Ship Yards on the Great Lakes . . ." had shut down. He added that he would have taken any business that "wouldn't be jeopardizing a ship . . ." but none was offered.

Walter Knapp, manager of the Toledo yard of Respondent, testified that, on August 10, he had about 24 unit employees working on maintenance with no repair work of any kind for them to do and none on order. He described contacts he had with the owners of nine vessels who refused to bring their ships into Respondent's drydocks between August 1 and September 7, 1961, after conversations with him concerning the status of Respondent's labor agreement. He admitted that all managers had been told as early as July by Midnight to inform customers about the labor contract when they telephoned. He volunteered the information to those who did not ask, and those who did ask were told that the situation was "not too good." He conceded, that although it was part of his job to get business for the yard, he did not plead with customers for work but merely gave them information about the labor negotiations.

Jerry Thoman, manager of the Buffalo yard, testified that he attended the meeting of the managers after the August 10 bargaining session and was unable at that time to justify the retention of the summer nucleus crew in Buffalo because he had no prospects of work that would return a reasonable amount of revenue. He stated that he sought work and did secure a small amount of a kind that would not make a vessel unseaworthy, but that large repair orders were not forthcoming. He described an incident involving a vessel purchased for scrap by a dealer who wished it made seaworthy for transportation overseas. Thoman gave the customer a price estimate, but when the customer discovered that Respondent had no labor agreement, it refused Respondent the work.

Thoman also related incidents involving the vessels "Mataafa" and "Ingalls" which Respondent anticipated drydocking during its labor negotiations. When the owners of the vessels learned of the uncertain state of Respondent's labor agreement they took the "Mataafa" to Canada for repair, but the "Ingalls" was permitted to operate by the Coast Guard until the end of the operating season. In addition, he testified that the owners of the "Drekenmiller" took the ship to a competitor during the same period when they learned that Respondent had no labor agreement. He added that the "Drekenmiller" owners were the same people who had a vessel caught in one of Respondent's yards during a previous strike.

Thoman testified that a negligible amount of work was obtained by him between August 1 and October 1 to keep some men busy but this was not the kind of work that would make a ship unseaworthy and involve the vessel in the event of a strike. He stated that he refused no work offered him but admitted that in his opinion ". . . the owner that brought the boat into the dock would have rocks in his

head if he would have taken the chance." He conceded that he could have made that statement to owners during the unsettled period.

Gordon Stafford, manager of repair sales at the Cleveland office of the Company, who primarily handles large repair or conversion jobs, also testified with respect to asserted reluctance on the part of customers to dock their vessels in Respondent's yards during the contract negotiations. Stafford stated that the owners or agents of four vessels, the "USS Prescott," a United States Navy ship; the "Markam," a United States Coast Guard vessel; the "Ishpeming," owned by Cleveland Cliffs Co.; and the "Challenger," owned by Pioneer Steamship Company, failed to put the vessels in Respondent's drydocks during contract negotiations when they learned that negotiations were still going on.

Nathan Louis, a Navy contract specialist, with whom Stafford dealt regarding the "Prescott," denied that the Navy was at all reluctant to put the "Prescott" in drydock even though he was told by Stafford about the labor negotiations and informed by him that the employees would walk off the job if the vessel was [illegible] He testified that he had repeatedly asked Res[illegible]o the needed work but Respondent had refus[illegible]hat due to labor difficulties it was not in a po[illegible]o take work at any of its yards. Louis testified fr[illegible]ords made at the time of the conversations with Sta[illegible]rd, and I credit his testimony.

Stafford's testimony was also shaken by his admission that he had no personal knowledge about the "Ishpeming" and tha the first time he talked to the customer about it was in November 1961. Stafford was uncontradicted about the "Challenger," but he admitted that he had both the "Challenger" and "Ishpeming" owners write letters in November 1961 indicating reluctance to have repair work done

because of labor trouble and had the letters backdated to August 11, 1961. These letters were sent to the National Labor Relations Board during the investigation of the instant case.

With respect to the "Markham", Stafford volunteered the information to the Corp of Engineers about Respondent's labor negotiations. On the other hand, his testimony that the Corp of Engineers was reluctant to dock the vessel was uncontradicted and, in fact, corroborated by Walter Knapp's testimony about the same vessel, as well as the dredge "Hayes," about which he was contacted by the Corps of Engineers. Despite Stafford's refutation by Louis, whom I have credited, and his backdating of the letters, I do not discredit him entirely but find, on the basis of his whole testimony, some evidence that customers were reluctant to bring work to Respondent during Respondent's labor negotiations.

General Counsel argues that the testimony of Respondent's own representatives, namely, Midnight, Dalrymple, Knapp, Thoman and Stafford, as summarized above, shows that any lack of work existing in Respondent's yards on August 11 was not caused by customer refusal to supply Respondent with work, but by Respondent's determined plan to avoid taking work into its yards in order to force the employees to submit to the Company's proposed contract terms.

I do not agree with General Counsel's argument insofar as it implies that the absence of work at the yards on or about August 11, and in the period prior to the execution of a new agreement, was unconnected with customer reluctance or refusal to give Respondent work. Respondent has but 14 or 15 ship-owner customers and Midnight testified credibly that Respondent's unresolved labor problem was well known from newspaper accounts. I also credit his testi-

mony that customers knew that no contract had been signed from conversations with him. Although I credit Navy representative Louis as against Stafford, and find that Stafford refused work on the "Prescott" on or about August 31, I also credit Thoman and Knapp, managers of the Buffalo and Toledo yards, respectively, in their testimony that a substantial number of owners were reluctant to bring their vessels into Respondent's yards during the crucial periods. One of the owners had had a vessel tied up in a strike once before, and the others must be assumed to be aware of the facts of life, particularly that neutrals are endangered when caught between the fire of even once friendly powers. On the other hand, I think it a fair appraisal of the record, based on Thoman's and Knapp's testimony, that information about the unsettled contract was volunteered to customers coupled with gloomy predictions designed to discourage the unwary customer. But nevertheless, even here the deliberate discouragement of customers cannot be viewed apart from Respondent's belief that a strike was possible at any time, for good customer relations is as reasonable an explanation of the discouragement as is an intention to put pressure on the employees by locking them out for no reason other than a desire to impose Respondent's terms on them. Finally, no ultimate finding regarding motive in the circumstances can be fairly made without relation to what Respondent believed its customers believed and would do as a class with respect to placing their property in Respondent's yards when Respondent had no labor agreement for a definite term, regardless of the merits or exact status of the controversy as between the immediate parties.

Viewing the situation as I believe it realistically appeared to Respondent at the time, I find that Respondent had little more than maintenance work in its yards on August 11: that

as found above, it believed a strike was a reasonable hypothesis; that it knew or reasonably believed that customers as a class would give it little business during such a period; and that it discouraged all potential customers from entrusting vessels to Respondent.[9] I find that Respondent was in large measure motivated in discouraging orders and laying off its employees by its realistic appraisal of the economics of the situation. I also believe, of which more later, that Respondent, confronted with a situation such as I have described, was also motivated, in part, in laying off the employees as it did in order to break what it believed to be an impasse in bargaining and bring economic pressure on the employees to take less favorable terms and to take them before Respondent became more vulnerable to strike action in its busy season which was approaching.

7. The existence of an "impasse" on August 10, 1961.

Recognizing that in certain cases the existence of a stalemate or impasse in collective bargaining is deemed relevant in assessing the validity of certain employer conduct, such as unilateral[10] or defensive action,[11] Respondent and General Counsel are at issue about the existence of an impasse when the layoff occurred.

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9. I think it of only very minor significance that some of Respondent's customers went to Respondent's competitor during the layoff of the Chicago yard even though the competitor also had an unresolved dispute with the Boilermakers Union. Most of the work done was not done at the dock of the competitor. In addition, we know little about the relative sizes of Respondent and its competitor to judge the importance of the respective companies in the Unions' view. Nothing appears about past strike activity in the record to assist in evaluating the possibilities of a strike at the competitor.

10. See *National Labor Relations Board* v. *Crompton Highland Mills*, 337 U. S. 217.

11. See cases cited footnotes 16, 17, 18, 19, *infra*.

Respondent's chief negotiator and attorney, Cavano, testified that ". . . it was the Company's belief that when negotiations broke off on August the 9th, 1961, that an impasse had been reached between the Company and the Unions, and that it was necessary for the Company to decide what its future course of action should be in the light of what it believed to be an impasse." General Counsel does not admit that an impasse would justify Respondent's action, but denies its existence in any event. In support of his position he points out that there had been progress in negotiations up to August 11 and beyond, and that at the last session before the layoff it was understood that the conciliator would call the next meeting. I do not think that these facts alone can negate a reasonable belief on Respondent's, or any experienced negotiator's part, that negotiations seemed to have broken down. Progress indeed was made to a point where the parties were perhaps 8 or 9 cents per hour apart on wages but this was not a petty difference to Respondent in the light of its plea of competitive disadvantage. Moreover, it had taken a dozen long sessions and the aid of Conciliation to reach that point. The fact that Conciliation was to call a meeting when it "thought proper" is greatly different from a meeting scheduled by the parties themselves, for Conciliation and other third party intervention exist, in part, for the purpose of resolving deadlocks.

The existence of an impasse judged with hindsight is as difficult to determine as the reasonableness of Respondent's belief that a strike would occur. And it is as equally unfair and unobjective to conclude, that since the parties finally settled their differences, their apparent deadlock on August 10 was not a reality to them, as it is to say, that since no strike occurred, none was contemplated. The in-

tervention of the layoff, the passage of time, the use of Conciliation, and other events, may have broken the deadlock. In any event, another dozen meetings and, the passage of more than 2 months after the layoff were needed to resolve the issues which separated the parties, so that there is little, if anything, in the period after August 10 that dilutes the facts which support an inference that a deadlock existed before but, on the other hand, something to strengthen them.

Impasse cannot be determined by completely objective criteria. Subjective considerations, if held in good faith even if ignorantly, cannot be disregarded. A labyrinth is only a difficult journey for one with the thread, but a locked door is a cell to one who does not know that the key is in the room. When, on August 10, after a dozen meetings, the parties were substantially apart on monetary items, and had no agreement on term of the contract, and the Unions refused to take a new company proposal to the membership, making no counteroffer, the Respondent had every reason to believe that negotiations were deadlocked for all practical purposes, and I so find.[12]

8. Respondent's mixed motives in the layoff.

For competitive reasons Respondent was eager to reopen the labor agreement early so that it could be in a more favorable position to bid on or otherwise secure work. It is essential here not to lose sight of the fact that in the summer months when lake vessels are sailing Respondent's business is in the doldrums, and that the busy, more lucrative season begins when vessels are tied up for the winter. On two occasions, long before the agreement was to expire, dis-

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12. In *Crompton Highland Mills, supra*, a classic case about the right of an employer to take unilateral action after an "impasse", the court, at page 218, stated that negotiations had reached "something of an impasse."

cussions were had between the parties, in which the condition of the industry on the Great Lakes was discussed, and Respondent attempted to alert the Unions to the problem and to reopen the agreement early. After considerable bargaining Respondent believed that part of the Unions' strategy when the agreement expired was to continue to bargain until it could get Respondent into a more vulnerable position and then strike it. In my opinion, Respondent reacted to this stratagem by closing down the yards when it was most convenient and less hurtful to it to do so, namely, in the summer when business was bad, and as I have found in more detail above, when it anticipated no work of any importance because of the unresolved dispute, in order to prevent the Unions from closing, or threatening to close them, by a strike at a time most favorable to the Unions. This view of Respondent's motivation in the layoff is supported by Respondent's brief. In the brief Respondent states:

Respondent, at all times after August 1, 1961, the date the agreement expired, had a "sword of Damocles" hanging over its head. From its past strike history, including a so-called "wildcat" strike at Chicago in February 1961, and the 1955 incident, when the riveters slowed down before the agreement expired, enabling the Union to strike while a customer's ship was in the dock, it was apparent that a strike would occur at any time.

Respondent feels that if ships were in the docks after August 1, 1961, there would have been a repetition of the same thing that happened through all the previous years. As it happened, there were no ships in our docks at Chicago Toledo, or Buffalo, and the one ship we did have was berthed at Lorain long before the expiration date of the agreement.

It is our opinion that the Unions intended to continue the status quo; that is, force Respondent to continue employees

working at Toledo, Chicago, and Buffalo, on maintenance, nonproductive work, until such time as a ship was docked at those locations, and then to strike the yard.

The Unions strategy was:

(1) Keep working at Lorain, keep the non-productive men on the payroll as long as possible at the other yards until one of two things occurred:

(a) A ship owner would send a ship into one of the yards, and then by striking, the Respondent would be forced to his knees in effecting a labor settlement satisfactory to the Union, and if this didn't occur, then:

(b) Continue to bargain, into the winter months, and then execute an agreement effective in November, December, January, or February, and in this way, when the agreement was re-opened, Respondent would be sure to have ships in its docks, and a strike at such time would bring the Respondent to its knees in effecting an agreement.

Respondent's position then, was that on August 9, 1961, when the Respondent's proposal was rejected, no counter-offer was made, the Union refused to take the offer to the membership for a vote, and no date was set for another meeting, that these events indicated either a strike would occur, or that bargaining sessions would be prolonged until a ship was in the dock, and such a situation left Respondent helpless as to the men working on maintenance in the yards, with no work on hand, none anticipated, and customers refusing to send work in.

If the employees were to be laid off because of lack of work, Respondent, in effect, would be financing the labor dispute, in that employees would collect unemployment benefits up to 26 weeks, the cost of the premiums being borne by

Respondent, alone, and this would extend the bargaining into the winter months, which was apparent to Respondent the Unions were trying very hard to do.

* * * * *

Respondent believes its action in laying off the employees was a proper defensive counter measure to the Union's objective of delaying negotiations until the Respondent's busy season and then coercing the Respondent into acceptance of the Unions' demands by strike or threat of strike, especially since the Respondent affirmatively and honestly was desirous of negotiating and reaching an agreement, and such action is protected under the Act. *Duluth Bottling Association,* 48 NLRB 1335; *International Shoe Company,* 93 NLRB 907; *Betts Cadillac Olds, Inc.*

This frank statement that Respondent's action of laying off the employees in the circumstances existing at the time was a defensive countermeasure to the Unions' objective of delaying negotiations until Respondent's busy season is supported by other evidence in the record. Midnight in explaining why Respondent would not agree to extend the agreement stated that:

> . . . our immediate answer was no, . . . the ships are sailing for eight months of the year and the other four months they cannot sail into the ice conditions on the lake, so that every possible repair that could be put off until the winter season is put off and the customer then schedules his ships for dry docking and repairs during winter season, and if we were to have contract negotiations come up the 1st of February or sometime during the winter season, the customers would be fully aware of that and would not bring their ships in to us that winter knowing that we were liable to have a strike. . . .

In the light of the admissions, Midnight's testimony, and the whole record, including, for example, the suddenness of the layoff without prior notice to the Unions, I find that Respondent was partially motivated in laying off its employees when it did by a desire to break a deadlock and pressure the Unions into an earlier and generally more favorable agreement. In short, it was Respondent's position that if there was to be a war—let it begin here and now.

B. Concluding findings.

1. As to the 8(a)(1), (3), and (5) violations in laying off employees.

Laying aside for the moment the ultimate question of the legality of the layoff, the record shows, and there is no intimation to the contrary by anyone, that the parties bargained in good faith throughout. I have found earlier that, on August 10, 1961, an impasse in bargaining existed, or that an objective viewer, at least, could reasonably believe that negotiations were deadlocked. On that date, except for Lorain, Respondent had little more than unproductive maintenance work in its yards, and had reasonable grounds to believe that customers would be reluctant to entrust their vessels to Respondent so long as the issues between the Respondent and Unions were unresolved. Indeed, the record shows that some customers, at least, actually sent work elsewhere. In addition, although Respondent discouraged ship owners from giving Respondent work, this advice, I have found, was equally consistent with Respondent's intention to protect its customers in the event of a strike, as with an object of pressuring the Unions to capitulate. I have also found that on August 10, Respondent honestly believed that a strike might take place immediately, or when a vessel was docked, or that bargaining would be delayed until closer to

the winter months when Respondent would be more vulnerable. I then concluded that Respondent, on the basis of all the factors mentioned, including its intention to break the deadlock in the hope of an early and more favorable agreement, laid off its employees and notified the Illinois Department of Labor, Division of Unemployment Compensation, that the employees were laid off because of a "labor dispute" and not for lack of work, in order to block benefits for them under Illinois law.

An employer is free, whether or not bargaining is in progress at the time, to suspend operations for business or other reasons unrelated to the exercise by his employees of their statutory rights. It cannot be gainsaid, therefore, considering the findings I have made above, that Respondent's layoff of August 11, if it is viewed apart from its desire to break an impasse before the winter season, cannot be held illegal because Respondent had no productive work on hand and little anticipated as a result of its labor problems. I do not think that the circumstances existing on August 11, as found above, which would have excused Respondent from culpability in the layoff, became tainted with illegality merely because Respondent, finding itself in a difficult economic position exacerbated by the labor situation, decided to take whatever advantage it could of it in the hope that the deadlock might be broken. Although Respondent's motivation could be considered to be a mixture of clearly permissive and possibly improper, the economic inducements so overshadowed anything improper that they must be considered primary, particularly when the economic factors which supported them arose through no fault of Respondent and anteceded the layoff.

The case at bar falls somewhere within the principles found in a line of cases where an employer has been found

to have taken certain "defensive actions" during bargaining. It is well recognized that although employees have the right under the Act to engage in concerted activities including the right to strike, employers may, in certain circumstances, take various defensive actions to protect their businesses against loss or inconvenience to themselves or their customers. An employer may, of course, replace economic strikers in order to keep his business going,[13] and he may lock out all employees in certain circumstances, such as in the event of a strike or a threatened strike, in order, for example, to preserve multi-employer bargaining or prevent serious inconvenience to his customers.[14] Economic hardship may justify temporary lockouts or refusals to reopen during a strike, absent reasonable assurances of a measure of continuous operations.[15] In each case "The ultimate problem is the balancing of the conflicting legitimate interest."[16]

General Counsel and Respondent recognize, of course, the principles to be applied, and are aware that conflicting interests are to be balanced, but they point to different cases as governing the situation. General Counsel, for example, relies on the *Quaker State Oil Refining Corporation*;[17] *American Brake Shoe Company*,[18] and *Dalton Brick & Tile Corporation*,[19] line of cases for support, and Respondent, on

13. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333.

14. *N.L.R.B.* v. *Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U. S. 87; *Betts Cadillac Olds, Inc.*, 96 NLRB 268; *Packard Bell Electronics Corp.*, 130 NLRB 1122.

15. *International Shoe Company*, 93 NLRB 907; *Duluth Bottling Association*, 48 NLRB 1335.

16. *N.L.R.B.* v. *Truck Drivers Local 449*, 353 U. S. 87, 96-97.

17. 121 NLRB 334, enfd. 270 F. 2d 40 (C. A. 3), cert. denied 361 U. S. 917.

18. 116 NLRB 820 set aside 244 F. 2d 489 (C. A. 7).

19. 126 NLRB 473, reversed (C.A. 5), April 13, 1962 (49 LRRM 3099). The Court's opinion contains a good survey of the cases and literature in the field.

the leading *Betts Cadillac Olds, Inc.*, authority. In my view, substantial fact differences in the cases cited, distinguish them from ours.

In *Betts Cadillac, Olds*, for example, when the members of the employer association involved closed down, two of their members had already been struck, but in the instant case a strike was only a possibility, albeit a real one, to Respondent, and its timing was uncertain.

On the other hand, in both *Quaker State Oil Refining Corporation*, and *Dalton Brick and Tile Corporation*, there was no reasonable basis to fear a strike, nor the existence of a bargaining impasse. Similarly, in *American Brake Shoe Company*, the Respondent announced its proposed course of action at the very first bargaining session when it had no reason to believe, the Board found, that the negotiations would result in disagreement and a strike. Here I have found, however, both an impasse and reasonable grounds to believe that a strike would take place at the Unions' convenience.

In addition to the substantial differences in the cases cited by General Counsel there exists here two factors which I feel tip the scales in favor of Respondent. Unlike any of the cited cases, Respondent maintained a nucleus crew in summer only in expectation that there would be emergency work. The existence of an unresolved labor dispute, however, made it unlikely that customers would utilize Respondent's services in any substantial degree during that dispute. In addition, the very nature of Respondent's business, namely, the repair of extremely valuable property of customers at Respondent's premises, made Respondent justifiably wary of jeopardizing such property at the risk of customer dissatisfaction. From this point of view the case is stronger for Respondent than *Betts Cadillac Olds*, which

involved customers' automobiles, or *Packard Bell Electronics Corporation,* which concerned customers' television sets.

I conclude, on the basis of all factors involved, the Respondent was economically justified and motivated in laying off its employees when it did, and that the fact that its judgment was partially colored by its intention to break the impasse which existed is immaterial in the peculiar and special circumstances of this case. Respondent, by its actions, therefore, did not violate Section 8(a)(1), (3), and (5) of the Act.

2. As to the alleged violations in notifying the Division of Unemployment Compensation that the employees were laid off because of a "labor dispute."

Respondent admits that it knew that under Illinois law employees who are laid off because of a labor dispute are not entitled to unemployment compensation, and that it was Respondent's intention to block payments to employees by so describing the layoff rather than as being merely for lack of work. Respondent states that if the employees were laid off "for lack of work" Respondent would be in effect financing the labor dispute, for employees would collect benefits up to 26 weeks, and that this, in Respondent's view, would extend the bargaining into the winter months.

Respondent's action, therefore, concededly was in part for the purpose of putting pressure on employees to refrain from bargaining as they chose. I think, however, although the case is not free from doubt, that basically the same considerations which justify Respondent's layoff of employees absolve it of liability in so notifying the Division. I have found that Respondent's shutdown of the yards was caused in part by customer refusal to send in ships and Respondent's belief that this condition would continue. These refusals, and Respondent's forecast about the future, were

inextricably interwoven in the labor situation. To describe the layoff in these circumstances as, "Because of the labor dispute which has been unresolved since 8/1/61" does not seem to be an inaccurate statement of the facts. Because Respondent determined that Illinois precedents would disqualify the employees, does not make Respondent's action in stating the facts as it reasonably saw them illegal. Since Respondent's notification to the Division grew out of a layoff which I have found to be privileged, and since the notification was not a distortion of the facts, I find that Respondent was equally privileged in so notifying the Division.

I conclude that Respondent did not violate Section 8(a) (1), (3), and (5) of the Act in its notification to the Illinois Department of Labor.

Conclusions of Law.

1. The American Ship Building Company, South Chicago, Illinois, is engaged in, and during all times material herein was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The allegations of the complaint that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act have not been sustained by substantial evidence.

Recommendation.

It is recommended that the complaint be dismissed in its entirety.

Dated at Washington, D. C.

GEORGE J. BOTT,
Trial Examiner.

D-5290
South Chicago, Ill.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD,

The American Ship Building Company and Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers	Case No. 13-CA-4504

DECISION AND ORDER.

On May 31, 1962, Trial Examiner George J. Bott issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in unfair labor practices, and recommending that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and Charging Party filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in this case and hereby adopts the findings and conclusions of the Trial Examiner only to the extent consistent with this Decision and Order.[1]

1. The request of the Charging Party for oral argument is hereby denied inasmuch as the issues are adequately presented in the record and in the briefs.

Contrary to the conclusion of the Trial Examiner, we find that American Ship Building Company, hereinafter called Respondent, violated Section 8(a)(1) and (3) of the Act when it laid off its employees at the South Chicago, Illinois, shipyard.

On August 11, 1961, Respondent notified its employees at the Chicago yard that they were being laid off. The Trial Examiner found that the layoff was precipitated by Respondent's fear of a strike either when a ship was brought in for repairs, or at a later time as Respondent's busy season drew near. He concluded that Respondent "locked out" its employees as a defensive measure in order to protect the property of its customers from being tied up in a strike.

In our opinion, the record does not support the Trial Examiner's conclusion that Respondent had reasonable grounds to fear a strike.

As more fully set forth in the Intermediate Report, employees at Respondent's four shipyards have been represented jointly by a group of eight unions[2] herein referred to as the Unions, and Respondent has bargained with this group since 1952. Sometime before May 1, 1961, the Unions gave Respondent timely notice of their desire to modify the terms of a contract expiring on August 1, 1961. Following the giving of this notice, bar-

2. The joint bargaining representative is composed of the following Unions: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U. S. and Canada; United Brotherhood of Carpenters and Joiners of America; International Brotherhood of Electrical Workers; Brotherhood of Painters, Decorators & Paper Hangers of America; International Brotherhood of Firemen and Oilers; International Union of Operating Engineers; and Patternmakers League of North America. All of these unions are affiliated with the AFL-CIO.

International Association of Machinists, AFL-CIO, represented the machine shop employees at the South Chicago, Illinois, shipyard in a separate unit.

gaining sessions took place. At several of these sessions, the Unions' chief negotiator, along with other Union officials, reminded the Respondent that although each prior contract negotiation had resulted in a strike, it was the intention of the Unions in 1961 to reach an agreement without resort to a strike, and that, in any event, any work brought into the yard before a strike, would be completed. On July 19, 1961, it appearing likely that agreement would not be reached by August 1, the Unions offered to extend for 6 months the expiring contract which contained a no-strike clause. The Respondent rejected this offer on the ground that such an extension would expire at the height of its busy season.

At a meeting on July 31, the Unions again offered a 6-month extension; alternatively, the Unions offered to extend indefinitely the old contract until a new agreement was reached, with the new agreement to be retroactive to August 1. Respondent also rejected these offers. At this meeting, Respondent's attorney asked if the Unions were going to close down the yards the next morning. The Unions' representative answered in the negative, repeating the Unions' position that there would be no strike.

On August 9, the parties met again. The Respondent made, but the Unions rejected, a new contract offer. Respondent's representative then inquired again whether the Unions would strike; and, again, the Unions' representative replied that there would be no strike.

The next day, August 10, Respondent's officials and yard managers met to discuss the situation. Among other things, it was decided that the South Chicago yard would be shut down completely.[3]

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3. Respondent also decided to, and did lay off, on and after August 11, 1961, the employees at its other yards as the work diminished. However, as no complaint issued as to these employees, their status is not in issue herein.

On August 11, all employees at Chicago and Toledo, as well as some at Buffalo, were issued layoff notices which read as follows:

> Because of the labor dispute which has been unresolved since August 1, 1961, you are laid off until further notice.[4]

The Board has held that when a strike is imminent, an employer is privileged to lock out its employees in order to protect the property of customers,[5] or to prevent waste or spoilage of perishable inventories,[6] or where the public safety and welfare are in danger.[7] However, in each of these situations the validity of the lockout was premised on the essential fact that there was a real strike threat. On the other hand, where the union has given the employer assurances that no sudden strike would be called, or that, in the event a strike were called, adequate safeguards would be taken by the union to protect the employer's facilities and work commitments during the course of the shutdown, a lockout is illegal; for in such a situation the lockout is deemed an offensive weapon intended to force the abandon-

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4. Cavano, Respondent's attorney, admitted that the language in such layoff notices was decided upon for the purpose of preventing the employees from securing unemployment compensation under Illinois law. Under Illinois law, Respondent was obligated to notify the State agency as to the reason of the layoff at the time the layoff occurred. (Under New York and Ohio law, the employer is not required to make any statement until after the employees have filed for compensation and then the employer may file a protest to an award, which Respondent did in the instant case.) The Illinois Unemployment Compensation Board found that the employees were laid off as a result of a labor dispute and accordingly they were denied benefits.

5. *Betts Cadillac-Olds, Inc., et al.*, 96 NLRB 268.

6. *Duluth Bottling Association*, 48 NLRB 1335.

7. *Building Contractors Association of Rockford, Inc.*, 138 NLRB No. 143.

ment of the union's contract demands and the acceptance of the employer's.[8]

Here, it appears that the Unions made every effort to convey to the Respondent their intention not to strike; and they also gave assurances that if a strike were called, any work brought into Respondent's yard before the strike, would be completed. The Unions further offered to extend the existing contract for 6 months, or indefinitely, until contract terms were reached; in either case, the no-strike clause was to remain in effect during the negotiations.

In these circumstances, Respondent, having refused to accept the Unions' assurances that there would be no strike and having also rejected the Unions' offer to continue the existing contract, cannot now claim that there was reasonable ground to fear that the Unions would strike at some indeterminate date. Indeed, we find that there was, in fact, no reasonable ground for such a fear.

Accordingly, we conclude that Respondent, by curtailing its operations at the South Chicago yard with the consequent layoff of the employees, coerced employees in the exercise of their bargaining rights in violation of Section 8(a)(1) of the Act, and discriminated against its employees within the meaning of Section 8(a)(3) of the Act.[9]

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8. *Quaker State Oil Refining Corporation*, 121 NLRB 334, enfd. 270 F. 2d 40 (C. A. 3). See also *Utah Plumbing & Heating Contractors Association*, 126 NLRB, 973, enfd. 294 F. 2d 145.

9. *Quaker State Oil Refining Corporation, supra* and *Utah Plumbing & Heating Contractors Association, supra.*

Although such conduct has also been found to be the antithesis of good-faith bargaining as contemplated by Section 8(a)(5) of the Act, we find it unnecessary to pass on this issue herein. For it appears that on October 28, 1961, the parties entered into a new agreement, and thus no real purpose would be served by entering a bargaining Order at this time. Moreover, the cease and desist provisions of the 8(a)(1) and (3) Order entered here will substantially forestall the objectionable conduct which gave rise to the 8(a)(5) issue.

The Effect of the Unfair Labor Practice on Commerce

The conduct of the Respondent set forth above, occurring in connection with the operations of the Respondent as set forth in Section I of the Intermediate Report, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tends to lead to labor disputes burdening and obstructing the free flow of commerce.

The Remedy

Having found that Respondent has engaged in unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent unlawfully laid off its employees at its South Chicago, Illinois, shipyard on August 11, 1961. The complaint, however, alleged that Respondent's unlawful conduct in locking out and laying off its employees continued from August 11, 1961, until October 27, 1961. In view of this fact and the fact that the parties executed a new contract on October 28, 1961, and in the absence of any evidence to show that any employee was not recalled or reinstated on or before October 28, 1961, we will not order the reinstatement of any employee. We shall, however, order that Respondent make whole each of the laid off employees for any loss of pay he may have suffered by reason of his unlawful layoff during the period from the date of his layoff through October 27, 1961, by pay-

In view of the scope of the backpay Order, we also find it unnecessary to pass on the allegation that Respondent violated Section 8(a)(1) of the Act by interfering with the employees' claims to unemployment compensation during the period they were unlawfully locked out.

ment to him of a sum of money equal to that which he would normally have earned as wages during such period, less his net earnings during that period, such sums to be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289. Interest at the rate of 6 percent per annum shall be added to the backpay to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB No. 97.

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of the Act.

2. By locking out its employees at the South Chicago, Illinois, shipyard, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, American Ship Building Company, South Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of

the U. S. and Canada; United Brotherhood of Carpenters and Joiners of America; International Brotherhood of Electrical Workers; Brotherhood of Painters, Decorators & Paper Hangers of America; International Brotherhood of Firemen and Oilers; International Union of Operating Engineers; and Patternmakers League of North America, all of which Unions are affiliated with the AFL-CIO and compose the joint bargaining representative of the Respondent's employees, or any other labor organization of its employees, by discriminatorily locking out or laying off its employees.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the group of eight Unions listed above, or any other labor organization or group of labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make whole all employees listed in the Appendix attached hereto for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll

records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and compute the amounts of backpay due under the terms of this Order.

(c) Post at its South Chicago, Illinois, shipyard, copies of the notice attached hereto marked "Appendix."[10] Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by a representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director for the Thirteenth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C.

Boyd Leedom,
Member,

John H. Fanning,
Member,

Gerald A. Brown,
Member,

(Seal) *National Labor Relations Board.*

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10. In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Chairman Frank W. McCulloch and Member Philip Ray Rodgers, dissenting:

We agree with the Trial Examiner's conclusion that Respondent committed no violation of the Act when it suspended operations at its South Chicago shipyard on August 11, 1961. Like the Trial Examiner, we would find that Respondent's fears of a strategically-timed strike by the Unions with resultant unusual economic consequences were reasonable under the circumstances, and provided legitimate justification for its decision to decline further work commitments until bargaining developments became more certain.

One thing clear in this case is that Respondent's decision to suspend operations was based neither on union hostility nor a desire to avoid its bargaining obligations under the Act. There are no allegations of independent unfair labor practices, and Respondent had bargained in good faith with these Unions since 1952. Indeed, it was Respondent who requested the early opening of contract negotiations so that timely agreement might more easily be reached.

In concluding that Respondent's shutdown was justified, we have overlooked neither the oral statements by International Representative Alexander that a strike was not his "hope," nor the statements by several other Union officials that the Unions did not intend to strike during these negotiations. However, it seems to us, as it did to the Trial Examiner, that these statements pale beside the other circumstances in the case.

Thus, it appears Respondent had theretofore negotiated five times with the Unions since 1952. And it had experienced five strikes, that is, one strike per negotiation. On one of these occasions, in 1955, employees had engaged in a slowdown before the agreement had expired, causing a customer's ship to be caught in the yard during the ensuing

strike. In addition, in February 1961, there had been a "wildcat" strike in this same Chicago yard. Against that background, Respondent during the current bargaining had been specifically informed that a strike vote had been taken among the locals, and that the vote was overwhelmingly, in favor of a strike if the Unions' demands were not met. Finally, on August 9, the day before Respondent decided to suspend operations, the Unions had refused even to take Respondent's offer back to their members, and made no counteroffer of their own. As the Trial Examiner observed, "these facts alone could have led Respondent to reasonably believe that a strike would occur at any time after August 10, 1961."

Moreover, Respondent harbored justifiable concern that if the Unions did strike, they would choose a time when economic hardship affecting Respondent's customers would be greatest. The Respondent could reasonably infer that such a strategically-timed strike was under consideration by the Unions from the Unions' past conduct, particularly their strike in 1955 when an 8-million dollar ship was caught in the yard and thereby lost to the customer for 4 weeks during the customer's busiest season. Though the Unions offered Respondent an indefinite extension of the current contract, such an extension would have left the Unions free to strike at their pleasure.[11] Nor was the Unions' alternative offer of a 6-month extension of the contract calculated to relieve Respondent of its reasonable strike fears. Such an extension would have terminated the contract, as well as future renewals, during Respondent's own busiest season, the winter months. From Respondent's point of view, such an extension would have been little better than none at all, as it would have been left in the unenviable position of bargain-

11. *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990, 993.

ing initially under an uneasy truce, and then being faced with the very real possibility of a shutdown during its own peak season. As the Trial Examiner, and by adoption, the Board, stated in *Betts Cadillac*,[12] "the pedestrian need not wait to be struck before leaping for the curb."

We note also the particular vulnerability of Respondent's customers due to the long-term nature of the work commitments involved and the extraordinary economic consequences of any delay in work. The shipping season on the Great Lakes ends of necessity with the winter months. Thus, a tie-up of a ship for several weeks during the shipping season has relatively great impact on operations for the year. Moreover, even a strike during the winter months might have a significant impact on the owners, because a work stoppage at Respondent's yards during a major overhaul could cause a delay in a ship's reentry into service at the opening of the shipping season. In these circumstances, it seems to us, as it did to the Trial Examiner, that Respondent had good reason for taking precautionary measures to protect the property of its customers.

In essence, that is what Respondent attempted to do in refusing to take new work at the South Chicago yard. The record shows not only that Respondent took pains to explain its labor situation to its customers, but also that many of its customers, otherwise aware of Respondent's precarious situation, hesitated for that reason to bring ships to Respondent's yards for repairs. As a result, there was no ship repair work to be done,[13] and no prospects of new work, when Respondent decided on August 11 to suspend opera-

12. *Betts Cadillac Olds, Inc.*, 96 NLRB 268, 286.

13. The last ship in the South Chicago yard left several weeks before Respondent's suspension of operations.

tions at the South Chicago yard and await further developments.[14]

In the circumstances present here, we, like the Trial Examiner, are persuaded that the Respondent's decision to suspend operations was primarily powered by valid economic considerations defensive in character. We do not go so far as to say that an employer may in all situations suspend operations during the course of collective bargaining simply because an agreement has not been reached and a possible strike may be in the offing. But we think it at least clear that an employer ought not be compelled to invite injury to its own business, and to that of its customers, by soliciting or accepting *new* orders for work to be done during a period when it has a genuine basis to fear strike delays leading to serious damage to its customers' interests, resultant customer illwill, and an attendant loss of future business. Yet—under our view of the facts—that is the practical effect of the majority's holding in this case.

The conclusion we reach here is not altered by the fact that the Respondent's decision to suspend operations may also have been motivated, although only subordinately as the Trial Examiner found, by a desire to impose pressure on the Unions to force an earlier and more favorable agreement. We need not now pass on the question of whether the use of such a pressure device, standing alone, may properly be viewed as trenching upon employees' statutory rights.[15] For even if that is so, there would still remain the necessity, in line with the teaching of the Supreme Court in analogous situations—

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14 The record shows that, in its other yards, where Respondent had work to be performed, these employees who had work to do were not laid off.

15. Cf. *Morand Bros. Beverage Co.* v. *N.L.R.B.*, 204 F. 2d 529, 531 (C. A. 7), cert. denied 346 U. S. 909.

of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.

N.L.R.B. v. *Erie Resistor Corp.*, —— U. S. ————, 53 LRRM 2121, 2124. See also cases cited in footnote 7 thereof.

On the record before us, we, no less than the Trial Examiner, are persuaded that, on balance, the Respondent's legitimate business considerations outweighed and justified any incidental invasion of employee rights that might have been involved. In short, it is our considered judgment that the factual situation now before us fits more nearly into the pattern of cases such as *Betts Cadillac* [16] than into that of the *Quaker State Oil* case upon which the majority opinion principally relies.

Accordingly, we would affirm the Trial Examiner's findings and would dismiss the complaint in its entirety.

Dated, Washington, D. C.

Frank W. McCulloch,
Chairman,

Philip Ray Rodgers,
Member.

National Labor Relations Board.

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16. *Supra*, footnote 12. See also *Packard Bell Electronics Corp.*, 130 NLRB 1122; *International Shoe Company*, 93 NLRB 997; *Duluth Bottling Assn.*, 48 NLRB 1335.

APPENDIX.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U. S. and Canada; United Brotherhood of Carpenters and Joiners of America; International Brotherhood of Electrical Workers; Brotherhood of Painters, Decorators & Paperhangers of America; International Brotherhood of Firemen and Oilers; International Union of Operating Engineers; and Patternmakers League of North America, acting jointly as the collective bargaining representative of our employees, or any other labor organization, or group of labor organizations, by discriminatorily locking out or laying off our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Group of Eight Unions listed above, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of col-

lective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

We will make whole the below-named employees for earnings lost as a result of the discrimination against them.

J. Couillard
G. Homan
F. Blazic
L. Ferguson
T. Franciscovich
L. F. Williams
F. Dudek
D. J. Thompson
A. J. Serapin
A. Picciola
P. Mungas
E. D. Mantz
F. Krisco
F. Jansky
V. Dalla Costa
A. Barclay
E. Jansky, Jr.
E. J. Wolff
C. I. Bulak
M. Horvatich
H. Calhoun
R. Scott
A. N. Chorak
A. Rigoni
T. Delaney
W. Steinken
N. T. Rosenquist
J. W. Oman
P. Miller
L. Deneve
J. Barrick
M. Cox
E. Lipka
J. J. Salakar
H. W. Signs
J. Piltaver

J. McGrory
C. F. Mierendorf
F. S. Machowski
W. Klassen
R. Ferry
P. Cruse
H. G. Kutzer
R. Jansky
H. Domhrowski
M. Boich

American Ship Building Company,
Employer.

Dated .....

By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Midland Building, 176 West Adams St., Chicago 3, Illinois, CEntral 6-9660, if they have any question concerning this notice or compliance with its provisions.

BEFORE THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Petitioner, and National Labor Relations Board, Respondent.	No. 18011

PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed July 23, 1963)

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, hereinafter called the "Petitioner", by Bernard M. Mamet and Theodore J. St. Antoine, their attorneys do hereby petition the United States Court of Appeals for the District of Columbia to review and modify the Decision and Order of the National Labor Relations Board entered in Case No. 142 NLRB No. 133 (13-CA-4504) requiring The American Ship Building Company, a New Jersey corporation, hereinafter called the "Employer", to (1) cease and desist from (a) discouraging membership in the petitioning Union and the other labor organizations which comprise the joint bargaining representative of the Employer's employees by discriminatorily locking out or laying off its employees and

(b) in any other manner interfering with or coercing its employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act, as amended; (2) to take affirmative action by (a) making whole specifically named employees for any loss of pay, (b) making pertinent records available to the National Labor Relations Board and its agents in order to determine back pay due and (c) posting a notice at its South Chicago, Illinois shipyard—and in support of such Petition states as follows:

1. Statement of the Case

On March 24, 1961, the Petitioner filed charges against the Employer. The Employer, a New Jersey corporation, at the time of the issuance of the complaint operated shipyards in Buffalo, New York, Lorain, Ohio and South Chicago, Illinois, and Toledo, Ohio. A complaint issued on December 2, 1961, alleging in substance that the Employer has illegally locked out and laid off certain employees commencing on August 11, 1961 and continuing until October 27, 1961. A hearing was held before a Trial Examiner on February 14, 15 and 16, 1962. On May 31, 1962, the Trial Examiner issued his Intermediate Report recommending dismissal of the complaint. The case was then transferred to the National Labor Relations Board and the Petitioner and the General Counsel of the National Labor Relations Board filed exceptions to the Intermediate Report. Subsequently on June 21, 1963, the National Labor Relations Board issued its Decision and Order, reversing the Trial Examiner and finding that the Employer illegally laid off or locked out its South Chicago, Illinois yard employees in violation of Section 8(a), (1) and (3) of the said Act. Although the Employer also laid off employees at its yards in Buffalo, New York and Lorain and Toledo, Ohio and also

the Board so found, no remedial order was issued by the Board as regards said yards because in the opinion of the Board the complaint as issued treated only the employees at the South Chicago, Illinois yard and not employees at other yards. Thus the Board felt it could find no violation as regards the other yards.

2. Venue and Jursidiction

Venue and jurisdiction is granted to the Court under Sec. 10 (f) of the National Labor Relations Act, as amended September 14, 1959 29 U. S. C. § 160 (f).

3. Contentions of Petitioner

Petitioner contends that the decision of the National Labor Relations Board is supported by substantial evidence on the Record considered as a whole, but that the Board erred in not additionally finding that the Employer illegally locked out or laid off its employees at Buffalo, New York and Lorain and Toledo, Ohio. Since testimony relative to such yards and the nature of the layoffs there was taken at the hearing, not only without objection from the Employer but was also affirmatively introduced by the Employer, the same was therefore in issue and litigated, irrespective of the Board's narrow construction of the complaint.

4. Relief Prayed For

The Petitioner, therefore, prays that the Decision and Order of the National Labor Relations Board in Case No. 142 NLRB No. 133 (13-CA-4504) be modified by finding that the Employer also illegally locked out its employees at its Buffalo, New York and Lorain and Toledo, Ohio yards, in addition to its South Chicago one and that the Employer be directed to make whole its employees at said yards.

5. Service Upon Parties

A copy of this Petition has been served upon the Respondents, the National Labor Relations Board and The American Ship Building Company in accordance with Rule 38 (a) of the General Rules of the United States Court of Appeals for the District of Columbia. A request upon the National Labor Relations Board for a certified copy of the transcript of the entire Record in the proceedings has been made and will be filed upon receipt thereof in accordance with Section 10 (f) of the National Labor Relations Act, as amended September 14, 1959, 29 U. S. C. § 160 (f).

Respectfully submitted,

Theodore J. St. Antoine
736 Bowen Bldg.
815 15th Street, N. W.
Washington 5, D. C.

Bernard M. Mamet
Suite 1326
327 South La Salle Street
Chicago 4, Illinois

Attorneys for Petitioner

Dated at Chicago, Illinois,
July 22, 1963.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,011

Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent.

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW ITS ORDER

(Filed August 12, 1963)

To the Honorable, the Judge of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), files this answer to the petition to review the Board order issued on June 21, 1963.

1. With respect to the allegations contained in Section (1) of the petition to review, the Board prays reference to the certified record of the proceeding before the Board for a full recital of the facts and proceedings had in this case.

2. The Board admits the jurisdiction of this Court as shown in Section (2) of the petition to review.

3. The Board denies each and every assignment of error in Section (3) of the petition to review.

4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper.

5. Pursuant to Section 10 (f) of the Act, and Rule 38(g) of this Court, the Board will certify and file with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of proceedings before the Board.

WHEREFORE, the Board prays that the Court cause of filing of this Answer and that this Court make and enter a decree denying the petition for review.

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 12th day of August, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Labor Relations Board,
Petitioner,
v.
American Ship Building Company,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed August 12, 1963)

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against American Ship Building Company, its officers, agents, successors, and assigns. Case No. 13-CA-4504.

(1) Upon due proceedings had before the Board in said matter, the Board on June 21, 1963, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent herein, its officers, agents, successors, and assigns. On June 21, 1963, the Board's decision and Order was served upon Respondent by sending copies thereof postpaid, bearing Government frank, by registered mail, to Counsel for Respondent.

(2) On July 23, 1963, pursuant to Section 10(f) of the Act, Local 374, International Brotherhood of Boilermakers,

Iron Ship Builders, Forgers and Helpers, AFL-CIO, charging party in the Board's proceeding filed with this Court a petition to review and modify the Board's decision and order. Said petition appears on the docket of the Court as No. 18011, Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO. The Board is filing herewith an Answer to said petition.

(3) In accordance with said petition to review and pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 38(g) of this Court, the Board will file with this Court before September 2, 1963, a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law and the Order of the Board sought to be enforced.

(4) Although Respondent is a New Jersey Corporation engaged in business in the State of Illinois, this Court has jurisdiction of this petition for enforcement by virtue of its jurisdiction over the entire proceedings upon the filng of said certified list in connection with the petition to review in No. 18011.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order thereupon a decree enforcing in whole the Board's said Order and requiring Respondent,

its officers, agents, successors, and assigns to comply therewith.

/s/ Marcel Mallet-Prevost

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this day of Aug. 12 1963.

UNITED STATES COURT OF APPEALS

National Labor Relations Board,
Petitioner,
v.
American Ship Building Company,
Respondent.
No. 18,056

ANSWER OF THE AMERICAN SHIP BUILDING COMPANY TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed August 27, 1963)

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The American Ship Building Company (hereinafter referred to as "Respondent"), having been served with a petition for enforcement by the National Labor Relations Board, for its answer to said petition asserts:

1. That it admits the allegations of paragraphs 1 through 3 of said petition.

2. That Respondent is a New Jersey corporation and is engaged in business in the state of Illinois and is entitled under the Act to have enforcement proceedings heard in the Circuit in which the alleged unfair labor practices occurred or in which it conducts business.

3. That the order of the Board here sought to be enforced and the findings of fact and conclusions of law upon which said order is based are unsupported by substantial

evidence on the record considered as a whole, and are contrary to law.

4. That the Decision and order of the Board are not in accord with the preponderance of the testimony taken, and are contrary to law.

5. Further answering, Respondent avers that, the findings of fact, conclusions of law, the Decision and Order of the Board were and are invalid and improper and should be set aside.

WHEREFORE, Respondent prays that the Court cause the filing of this Answer and that this Court transfer the proceedings in connection with the petition for enforcement to the Court of Appeals for the 7th Circuit and, if this relief be denied that it make and enter a decree denying the petition of the Board for enforcement of its Order and for such other and further relief as this Court shall deem proper.

Respectfully submitted

/s/ Charles Cavano
Charles Cavano
605 National City Bank Building
Cleveland 14, Ohio

/s/ William S. Tyson
William S. Tyson
821—15th Street, N. W.
Washington 5, D. C.

Attorneys for Respondent

Dated at Washington, D. C.
this 27 day of August, 1963.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent.

• • • • •

National Labor Relations Board,

Petitioner,

v.

American Ship Building Company,

Respondent.

No. 18011

MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR THE CONSOLIDATION OF CAUSES

(Filed August 12, 1963)

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board moves this Court to consolidate the above-captioned causes.

In support thereof, the Board respectfully shows:

1. The two above-captioned causes arise out of a single proceeding before the National Labor Relations Board known as Case No. 13-CA-4504.

2. The fact and issues involved in the two causes are identical. Only one Decision and Order has been entered after consideration of a single record before the Board.

3. In No. 18011, Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Charging Party before the Board, has petitioned the Court to review and set aside the Board's order. The Board is filing an answer thereto.

4. The Board is herewith filing a petition for enforcement of its order against American Ship Building Company.

5. Consolidation of the cases would conserve the Court's time as well as that of the parties, would avoid confusion as to the issues, would materially reduce printing expenses, and would otherwise serve the convenience of the Court.

WHEREFORE, the Board prays that its motion for consolidation of cases be granted.

/s/ Marcel Mallet-Prevost

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 12 day of Aug. 1963.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. September Term, 1963

18,011—Local 374, International Brotherhood of Boilermakers, etc. v. National Labor Relations Board

18,056—National Labor Relations Board v. American Ship Building Company

Before: Bazelon, Chief Judge
in Chambers.

ORDER

Counsel for the parties in the above-entitled cases having submitted their stipulation pursuant this Rule 38(k) of this court, and joint motion to approve the stipulation as to dates for filing the briefs and joint appendix of the parties and the stipulation and motion having been considered, it is

ORDERED that the motion be granted and the stipulation is hereby approved, and it is

FURTHER ORDERED that the above-entitled cases are hereby consolidated for all purposes, and that the said stipulation shall control further proceedings in these cases unless modified by further order of this court.

Dated: September 9, 1963

[fol. 323] [File endorsement omitted].

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18011

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 18056

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

THE AMERICAN SHIP BUILDING COMPANY, Respondent.

ON PETITION TO REVIEW AND MODIFY AND ON CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Mr. Bernard M. Mamet, with whom Mr. Theodore J. St. Antoine was on the brief, for petitioner in No. 18011.

[fol. 324] Mr. Ira M. Lechner, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom Messrs. Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and James C. Paras, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 18011 and petitioner in No. 18056. Mr. Herman M. Levy, Attorney, National Labor

Relations Board, also entered an appearance for petitioner in No. 18056 and respondent in No. 18011.

Mr. William S. Tyson for respondent in No. 18056.

OPINION—April 9, 1964

Before Burger, Wright and McGowan, Circuit Judges.

PER CURIAM: No. 18011 reaches us on the petition by the Union, the charging party, to review and enlarge an order of the Board issued June 21, 1963 pursuant to Section 10(c), National Labor Relations Act, 61 Stat. 146 (1947), 29 U.S.C. § 160(c) (1958). The Board found that the Intervenor, The American Ship Building Company, by locking out employees upon the expiration of the existing contract and while negotiations for renewal were pending, violated Sections 8(a)(1) and (3) of the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(1)(3) (1958). We find no basis for disturbing the Board's conclusion that the issue presented to it was limited to the layoff of employees at the South Chicago plant; other charges were not involved. Cf. *International Union of Electrical Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board,* 110 U.S.App.D.C. 91, 289 F.2d 757 (1960).

No. 18056 reaches us on the petition of the Labor Board for enforcement of the same order against The American Ship Building Company as respondent in No. 18056. American Ship Building contends that enforcement should [fol. 325] be withheld because the Board's findings were inadequate[1] and were not supported by substantial evidence, and because the lockout did not violate the Act in the circumstances found by the Board.

The question presented initially is narrowly whether the record contains evidence to support the Board's findings. On the whole record, and allowing for the important place

[1] Although the Board's findings did not spell out the coercive and discriminatory impact of the lockout on the rights of employees, we think this consequence is implicit and the omission of explicit findings does not warrant remand.

accorded to the Board's special experience, we conclude that the Board's finding that respondent had no reasonable basis for fearing a strike is not without the requisite record support. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951). Respondent alternatively contends that in the circumstances shown here a lockout was permissible as a valid economic response in the collective bargaining process; the Board rejected this contention. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board* v. *Truck Drivers Local No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.*, 353 U. S. 87, 96 (1957). We find no basis for disturbing the Board's conclusions.[2]

Affirmed.

[2] The Board's Decision and Order are reported at 142 N.L.R.B. No. 173 (1963).

[fol. 326] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,011

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 18,056

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

THE AMERICAN SHIP BUILDING COMPANY, Respondent.

ON PETITION TO REVIEW AND MODIFY AND ON CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Burger, Wright and McGowan, Circuit Judges.

JUDGMENT—April 9, 1964

These cases came on to be heard on the record from the National Labor Relations Board and on a petition to review and modify and a cross-petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases is hereby affirmed, and will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree.

PER CURIAM.

[fol. 330] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 331]

SUPREME COURT OF THE UNITED STATES

No. 255—October Term, 1964

THE AMERICAN SHIPBUILDING COMPANY, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted limited to Question 2 presented by the petition which reads as follows:

"2. Whether, under Section 8(d)(4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' statutory right to strike?"

The case is placed on the summary calendar and set for oral argument immediately following No. 7.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
JUL 6 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 255

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

CHARLES CAVANO,
605 National City Bank
Building, Cleveland 14, Ohio.

WILLIAM S. TYSON,
821 15th Street, N.W.,
Washington 20005, D. C.,
Attorneys for Petitioner,
The American Ship Building Company.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on April 9, 1964, affirming the decision and order of the National Labor Relations Board which was issued on June 21, 1963.

Opinions Below

The opinion of the Court of Appeals (Appendix A, infra, pp. 12-14) is reported at 331 F. 2d 839. The findings of fact, conclusions of law, and order of the National Labor Relations Board (292-308)[1] are reported at 142 NLRB 133.

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[1] References preceded by "R" are to the Record as printed for use of the Court below, ten copies of which have been filed here.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 9, 1964 (Appendix A, infra, p. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and section 10(e) of the National Labor Relations Act, as amended.

Questions Presented

1. Whether the National Labor Relations Board can legally conclude that violations of sections 8(a)(1) and (3) of the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. 158(a)(1) and (3) have occurred without making appropriate findings of fact or setting forth the reasons which would support such conclusions?

2. Whether, under Section 8(d)(4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' statutory right to strike?

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq), are set forth in Appendix B, infra, pp. 17-20.

Statement

The petitioner, American Ship Building Company constructs and repairs ships in four shipyards on the Great Lakes (R 259). Local 374 the Chicago local of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers charged petitioner with violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act because after an impasse had been

reached in the negotiations for a new employment agreement it had locked out its employees. The collective bargaining agreement which expired on August 1, 1961 was between the Company and the International Brotherhood of Boilermakers and seven other International Unions. Significantly, Local 374 was not a named party to this agreement.(R 260, 261, App. A. p. 16).[2]

A hearing on the charges was held by a Trial Examiner for the Board and on May 31, 1962 he recommended that the complaint be dismissed in its entirety (R 291). On June 21, 1963 the National Labor Relations Board by a three to two decision held the Company in violation of sections 8(a)(1) and (3) but dismissed charges of section 8(a)(5) violations (R 292-305). On April 9, 1964 the Court of Appeals for the District of Columbia Circuit found no basis for disturbing the conclusion of the Board that the issues were limited to employees in the Chicago shipyard of petitioner. However, the Court below upheld the enforcement order of the Board and affirmed its conclusions (App. A. pp. 12-14).

Due to seasonal factors the Great Lakes are frozen over and not navigable between November and April each year. Thus, petitioner has an extremely busy period when the Lakes are ice-bound in order to complete repairs on ships to enable them to operate during the ice free months (R. 285). For this reason a strike during the busy season would be an economic disaster for both petitioner and the shipping industry.

Negotiations on the new labor agreement had com-

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[2] In *Local Union No. 12405, District 50, United Mine Workers et al, v. Martin Marietta Corp.*, 328 F. 2d 945, (7CA) decided March 3, 1964, rehearing denied April 3, 1964 the Court held that the contractual bargaining representative should control institution of legal proceedings. This was not done here.

menced in late May 1961 some two months prior to the expiration of the old agreement (R 50, 262-264). The Company was anxious to reach agreement because of the depressed condition of the ship building industry on the Great Lakes at that time. Furthermore, it was faced with bargaining with a Union that had struck in 1952, 1953, 1955, 1956 and 1958 or on each occasion when the collective bargaining agreement was up for renewal (R 262). There had been five strikes in eight years with the 1958 strike lasting ten weeks. In addition, there had been two wildcat strikes in 1961 at the Buffalo and Chicago shipyards (R 262).

By August 11, 1961 when an impasse had been reached in negotiations the Company had had more than twelve bargaining sessions with the Union during the preceding two months (R 262-264) and the Union had refused to submit the Company's last offer to its membership. Moreover, no further bargaining meetings were scheduled (R. 265).

The Company on the basis of the past strike record of the Union feared that a strike was imminent. The Company also firmly believed that the strategy of the Union was to delay the negotiations until a ship entered its yards for repairs which could not be completed before the onset of its busy season thus placing the Company in a position where it would become most vulnerable to strike action. The Commissioner of the U. S. Mediation Service also feared strike action and asked for assurances from the Union on this point. Such assurances as were given were restricted to a period ending with a meeting scheduled for August 7, 1961 (R 257, 302). On August 11, 1961 when the Company's lay-off at the Chicago shipyard occurred only a skeleton crew was employed (R 267, 272, 275). A new two year agreement was executed on October 27, 1961

and the employees returned to work with full restoration of their seniority and other rights (R 65, 131, 267).

Reasons for Granting the Writ

1. This case is concerned with an employer's right under the National Labor Relations Act to lockout its employees, after an impasse has been reached in collective bargaining negotiations, in order to protect and safeguard the interests of its customers and its own economic well-being. This Court has accepted for review the decision of the Court of Appeals for the Tenth Circuit in *NLRB* v. *John Brown, et al.*, 319 F. 2d 7 (1963) (Supreme Court Case No. 558). The issue in the *Brown* case involves an employer's rights under the Act with respect to lockouts and particularly with regard to hiring replacements when there is a shutdown in a multi-employer situation. Although this is not a multi-employer situation, the issues here are similar and relate quite clearly to the same over-all problem of an employer's right to utilize the lockout under the Act to protect its economic interests. Thus, this Court's decision in *Brown* will so materially affect petitioner's rights that the decision of the Court below should not be permitted to become final while the issues in *Brown* remain undecided.

2. The decision of the Court below conflicts with the decisions of this Court with respect to Sections 8(b) and (10) of the Administrative Procedure Act (5 U.S.C. 1007(b), 1009(e)(5)).

The majority of the NLRB concluded that the Company "by curtailing its operations at the South Chicago Yard with the consequent layoff of the employees, coerced employees in the exercise of their bargaining rights in violation of Section 8(a)(1) of the Act, and discriminated against its employees within the meaning of Section 8(a)(3) of the Act" (R 296). This general conclusion phrased in the

language of the statute does not conform to the requirements of Section 8(b) of the Administrative Procedure Act nor does it satisfy the rule under that Act respecting the necessity of basic and supporting findings. The NLRB did find contrary to the finding of its Trial Examiner (R 272, 273), and despite the strike proclivity of the Union (R 262, fn. 3), that the Company should have accepted the Union's oral assurances that no strike would occur and that the Company had no reasonable ground to fear a strike. No finding of anti-union motivation was made nor was there a finding that such could be inferred.

The Board failed to find how, when, where and in what manner petitioner coerced or discriminated against its employees in violating Section 8(a)(1) and (3). Nor did it make the necessary finding as to how such discrimination had encouraged or discouraged union membership. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 42, 43 (1954); *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667, 674, 675.

The Court below (Appendix A—p. 13, fn. 1) admitted that "the Board's findings did not spell out the coercive and discriminatory impact of the lockout on the rights of employees", but decided that "this consequence is implicit and the omission of explicit findings does not warrant remand." This is plainly contrary to Section 8(b) of the Administrative Procedure Act which requires not only findings but supporting *"reasons or basis therefor"*. These are wholly lacking here. Indeed, even the "findings" are lacking.

As this Court stated, "We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest" and thus "We must first know what the 'finding' is before we can give it 'conclusive weight'." *Colorado-Wyoming*

Gas Company v. *Federal Power Commission, Colorado Interstate Gas Co., etc., et al.*, 324 U.S. 626. See, also, *Atchison T. & S. F. Ry. Co.* v. *United States*, 295 U.S. 193, 201, 202; *Florida* v. *United States*, 282 U.S. 194, 215; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475; *Universal Camera Corp. v. NLRB*, 340 U.S. 474; *Anglo-Canadian Shipping Co., Ltd. et al.*, v. *Federdl Maritime Commission* 310 F. 2d 606 (1962) (CA 9); *Commonwealth of Puerto Rico* v. *Federal Maritime Board*, 110 U.S. App. D.C. 17, 288 F. 2d 419. In the case of *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 68 App. D.C., 282, 96 F. 2d 554, 559, 563, from the District of Columbia Circuit, that Court pointed out that the absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings.

Thus, it cannot correctly be said that the conclusions of the Board are supported by substantial evidence unless the exact findings upon which they are based are first known. Accordingly, the ruling by the lower Court conflicts with federal law and decisions of this and other Courts on the requirements and safeguards of our system of proper administrative procedure. The importance of this protection to all litigants cannot be overemphasized.

3. The Court below rejected petitioner's claim that its lockout of August 11, 1961 was a valid economic response in the collective bargaining process. The Court was of the view that the Board in finding the lockout illegal, was within its powers of balancing the conflicting legitimate interests of the parties. (Appendix A, p. 14).

While such a view may be proper under circumstances not present here, nevertheless we submit that it is improper under the guise of "balancing" conflicting interests to ignore completely either the interests of the employer or to prohibit protected employer conduct.

Petitioner believes that it can be fairly stated that the effect of the decision below is to render a lockout illegal per se—despite the plain statutory language and decisions of this Court to the contrary. This is clear, we believe, from the lower Court's statement in footnote 1 of its decision that coercion and discrimination are implicit in a lockout (Appendix A, p. 13). Presumably then, there is neither a need for making appropriate findings to such effect nor a need to "balance" interests since coercion and discrimination are inherent in a lockout.

Thus, the Court below has, in effect denied an employer the use of a lockout to protect his economic interests. In accomplishing this result, the decision conflicts with decisions of several other Courts of Appeal and does violence to the language of Section 8(d)(4) of the Act.

This is not a case where there is any allegation of anti-union activity or motivation. The lockout was used purely and simply to protect the economic interests of the employer's business as a corollary of the Union's right to strike.

Although petitioner considers the lockout of August 11, 1961 purely defensive, it is plain in any event from the statutory language of Section 8(d)(4) of the Act and its legislative history that an employer is free to utilize a lockout under the circumstances here present. Economic pressure during the collective bargaining process by an employer is permitted by the Act just as a labor organization may use such pressure to achieve its goals even to the point of a strike. *NLRB* v. *Insurance Agents International*, 361 U.S. 477, 487. And, the Board exceeds its authority under the Act when it attempts to forbid economic pressure in order to control the terms of the collective bargaining agreement. *Insurance Agents, supra.*

The decision below conflicts with the decision of the Court

of Appeals for the Seventh Circuit (which is the jurisdiction in which this lockout occurred) in *Morand Bros. Beverage Co.* v. *NLRB*, 190 F. 2d 576, after remand, 204 F. 2d 529, cert. denied, 346 U.S. 909, in which that Court said with reference to a lockout being a counterpart of the employees' statutory right to strike:

> "We so hold, not merely on the basis of the implied recognition in the 1947 Amendment to the Act, Section 8(d)(4), of the existence of such a right, but because the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the Union, a corollary of the Union's right to strike." (190 F. 2d at 582).

These views of the Seventh Circuit have been referred to with favor by the Court of Appeals for the Ninth Circuit in *Leonard et al.* v. *NLRB*, 197 F. 2d 435, after remand to the Board, 205 F. 2d 355 (1953); the Court of Appeals for the Eighth Circuit in *NLRB* v. *Continental Baking Company*, (1955), 221 F. 2d 427; and the Court of Appeals for the Fifth Circuit in *NLRB* v. *Dalton Brick and Tile Co.*, 301 F. 2d 886.

This Court has made it clear that a lockout is not illegal, per se. *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 92. The Court did not find it necessary there "to pass upon the question, whether as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike" (Fn. 19, page 93, *Truck Drivers case, supra.*). Mr. Justice Brennan said,

> "The unqualified use of the term 'lockout' in several sections of the Taft-Hartley Act is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic

weapon. This conclusion is supported by the legislative history of the Act." *NLRB* v. *Truck Drivers Local Union No. 449, supra,* pp. 93, 94.

Significantly, this Court pointed out that while the NLRB had recognized lockouts where economic hardship was shown as legitimate under the Act, *the lower Court had erred, in too narrowly confining the legitimate use of lockouts by employers to cases of economic hardship* (id. at p. 97).

The purpose of Section 8(d)(4), the 1947 Amendment, was to create a position of equality under the Act for employers and employees. See *Leonard et al, supra.* The instant decisions of the Board and of the Court below, inevitably render Section 8(d)(4) meaningless.

Whether an employer can use the lockout under the Act to exert legitimate economic pressure during collective bargaining is extremely important to all of the many thousands of employers in the Nation who are subject to the National Labor Relations Act, as amended. The law on this subject requires clarification. See, for example, the decisions of the Court of Appeals for the Third Circuit in *Quaker State Oil Refining Corp.* v. *NLRB,* 270 F. 2d 40, and the Court of Appeals for the Tenth Circuit in *Utah Plumbing and Heating Association* v. *NLRB,* 294 F. 2d 145 as contrasted with the views expressed by the Fifth, Seventh, Eighth, and Ninth Circuits in *Dalton Brick and Tile Co., supra, Morand Bros. Beverage Co., supra, Continental Baking Co., supra* and *Leonard et al, supra.*

Resolution of the issues in this case would do much to secure that degree of uniformity so essential to enforcement of federal law. It would also aid in creating calm and stable labor and industrial relations.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES CAVANO,
605 National City Bank
Building, Cleveland 14, Ohio.

WILLIAM S. TYSON,
821 15th Street, N.W.,
Washington 20005, D. C.,
Attorneys for Petitioner,
The American Ship Building Company.

July 6, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18011

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 18056

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE AMERICAN SHIP BUILDING COMPANY, *Respondent*.

On Petition to Review and Modify and on Cross-Petition to Enforce an Order of the National Labor Relations Board

Decided April 9, 1964

Mr. Bernard M. Mamet, with whom *Mr. Theodore J. St. Antoine* was on the brief, for petitioner in No. 18011.

Mr. Ira M. Lechner, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *James C. Paras*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 18011 and petitioner in No. 18056. *Mr. Herman M. Levy*, Attorney, National Labor Relations Board, also entered an appearance for petitioner in No. 18056 and respondent in No. 18011.

Mr. William S. Tyson for respondent in No. 18056.

Before BURGER, WRIGHT and MCGOWAN, *Circuit Judges.*

PER CURIAM: No. 18011 reaches us on the petition by the Union, the charging party, to review and enlarge an order of the Board issued June 21, 1963 pursuant to Section 10(c), National Labor Relations Act, 61 STAT. 146 (1947), 29 U.S.C. § 160(c) (1958). The Board found that the Intervenor, The American Ship Building Company, by locking out employees upon the expiration of the existing contract and while negotiations for renewal were pending, violated Sections 8(a)(1) and (3) of the National Labor Relations Act, 61 STAT. 140 (1947), as amended, 29 U.S.C. § 158(a)(1)(3) (1958). We find no basis for disturbing the Board's conclusion that the issue presented to it was limited to the layoff of employees at the South Chicago plant; other charges were not involved. *Cf. International Union of Electrical Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board,* 110 U.S.App.D.C. 91, 289 F. 2d 757 (1960).

No. 18056 reaches us on the petition of the Labor Board for enforcement of the same order against The American Ship Building Company as respondent in No. 18056. American Ship Building contends that enforcement should be withheld because the Board's findings were inadequate [1] and were not supported by substantial evidence, and because the lockout did not violate the Act in the circumstances found by the Board.

The question presented initially is narrowly whether the record contains evidence to support the Board's findings. On the whole record, and allowing for the important place accorded to the Board's special experience, we conclude that the Board's finding that respondent had no reasonable basis for fearing a strike is not without the requisite record support. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951). Respondent alternatively contends that in the circum-

[1] Although the Board's findings did not spell out the coercive and discriminatory impact of the lockout on the rights of employees, we think this consequence is implicit and the omission of explicit findings does not warrant remand.

stances shown here a lockout was permissible as a valid economic response in the collective bargaining process; the Board rejected this contention. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board* v. *Truck Drivers Local No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.*, 353 U.S. 89, 96 (1957). We find no basis for disturbing the Board's conclusions.[2]

Affirmed.

[2] The Board's Decision and Order are reported at 142 N.L.R.B. No. 173 (1963).

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

No. 18,011

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 18,056

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE AMERICAN SHIP BUILDING COMPANY, *Respondent*

On Petition to Review and Modify and on Cross-Petition to Enforce an Order of the National Labor Relations Board

Before: BURGER, WRIGHT and MCGOWAN, *Circuit Judges*.

JUDGMENT

These cases came on to be heard on the record from the National Labor Relations Board and on a petition to review and modify and a cross-petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases is hereby affirmed, and will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree.

Per Curiam.

Dated: April 9, 1964.

(Filed April 9, 1964)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

No. 18,011

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 18,056

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE AMERICAN SHIP BUILDING COMPANY, *Respondent*

Before: BURGER, WRIGHT and MCGOWAN, *Circuit Judges*, in Chambers.

ORDER

On consideration of the motion of respondent in Number 18,056, for leave to submit pertinent case citation in *Local 12450, District 50, United Mines Workers, et al.* v. *Martin Marietta Corp.* (CA 7) (3/3/64) 55 LRRM 2592, CCH 49 LC par. 18,798, it is

ORDERED By the Court that the motion is hereby granted.

Per Curiam.

Dated: April 28, 1964.

(Filed April 28, 1964)

APPENDIX B

STATUTES INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151 et seq.), provides in pertinent part as follows:

"Sec. 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159(f)—(h) of this title, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the au-

thority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membershisp;

* * * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * * * * * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:" (61 Stat. 140; 5 U.S.C. 158(a)(1), (3), (d)(4)).

* * * * * * *

Sections 8(b) and 10(e)(5) of the Administrative Procedure Act (5 U.S.C. 1007(b), 1009(e)(5); 60 Stat. 242, 243) are as follows:

Sec. 8—"In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * * * * * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. (June 11, 1946, ch. 324, § 8, 60 Stat. 242.)

* * * * * * *

Sec. 10—"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * * * *

(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel

agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946, ch. 324 § 10 60 Stat. 243.)"

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. 12–14) is reported at 331 F. 2d 839. The Board's decision and order are reported at 142 NLRB 1362.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1964 (Pet. 15). The petition for writ of certiorari was filed on July 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board's findings adequately set out the basis of its conclusion that petitioner's lockout of

its employees violated the National Labor Relations Act.

2. Whether, in the absence of a strike threat, an employer engaged in collective bargaining with a labor union is privileged to layoff his employees for the purpose of obtaining a favorable contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are printed at pages 17–20 of the petition.

STATEMENT

Petitioner builds ships and repairs vessels at four shipyards adjacent to the Great Lakes. The Company's busy season is between November and April, when the Lakes are often frozen and shipowners are more willing to take their ships out of service for repair (J.A. 272; 74, 156).[1] During the summer months, however, petitioner always retained a nucleus of employees to perform yard maintenance and emergency repairs, and to prepare for the winter (J.A. 273; 74, 78, 191, 213).

In the spring of 1961, petitioner and a negotiating team representing eight craft unions exchanged proposals for a new contract to replace one then in effect and due to expire on August 1. Bargaining continued during June and July (J.A. 262–264). At the first bargaining session, the Unions' chief negotiator, Alexander, announced that the Unions wished to

[1] "J.A." refers to the Joint Appendix printed for the court below and filed with the petition.

negotiate an agreement without a strike, thus avoiding the shutdowns that had occurred in five of the past ten years (J.A. 262, 269; 28). He assured petitioner that the Unions "definitely did not intend to have a strike" (J.A. 269; 31–32), and other Union representatives told the Company that it could freely accept jobs because the employees would guarantee completion of whatever work was in the shipyards (J.A. 269–270; 31–32).

On July 19, when the parties had agreed upon 20 articles of a new contract (J.A. 110, 137–139), the Unions proposed a six-month extension of the old contract, which contained a no-strike clause (J.A. 263; 34). The Company rejected the suggestion on the ground that the extension would expire at the height of the busy season (*ibid.*). The Unions repeated their extension proposal on July 31 and made several counterproposals with respect to issues still dividing the parties (J.A. 264; 34–35, 112–113). The counterproposals were all rejected, but the Company asked and the Unions agreed that the Company's latest offer be presented to the employees. The Unions suggested further that the existing contract be extended until a new agreement, to be made retroactive to August 1, had been reached (J.A. 264; 35). Without explanation, the Company rejected that suggestion (J.A. 264; 35, 177), but it agreed to extend the existing contract long enough for the Union members to vote. Petitioner then asked if the Unions were going to strike the following morning. Alexander replied that they were not, reminded the Com-

pany that the Unions had consistently said that they were not going to strike, and reiterated this intention (J.A. 264; 35–36). The employees continued to work after the contract expired on August 1, but they rejected the Company's last proposal (J.A. 264; 35–36). When the Unions informed petitioner of the employees' rejection of its proposal on August 8, Company negotiators asked why the Unions had not struck (J.A. 264; 38). Alexander replied that the Unions "had insisted that we never intended to strike" (J.A. 264; 38). The next day, August 9, the Unions refused to take a new Company proposal back to the membership on the ground that the new proposal was less generous than the Company's previous offer (J.A. 265; 63–64).

Two days later, the Company shut down its Chicago yard, notifying the employees that it was laying them off because of "the labor dispute which has been unresolved since August 1, 1961" (J.A. 265–266).[2] In addition, petitioner laid off most of its employees at the Toledo yard, and began progressively to lay off workers at the Buffalo yard. At Lorain, however, an extensive force was engaged in the alteration of a large tanker, and none of those men was laid off (J.A.

[2] The Company determined to word the layoff notices in that manner in order to deprive the laid-off employees of unemployment compensation (J.A. 266). In Illinois the employees were unable to obtain unemployment compensation because under Illinois law loss of work as a result of a labor dispute is noncompensatory. In Ohio and New York when employees filed for benefits, the Company protested the allowance of compensation (J.A. 266; 129–130).

272; 150–151). As the job was completed the Company laid off the Lorain employees. No employees at any yard went on strike (J.A. 247).

On August 19, at another bargaining session, the Company's attorney stated that the Company could not take on any work because it did not know when the Unions were going to strike. In reply, Union representatives repeated their assurance that there would be no strike and again guaranteed that work taken into the yards would be completed, pointing out that no employees had quit at Lorain (J.A. 40–42). Finally, on October 22, a new contract was signed, and the laid-off employees were recalled to resume the emergency and maintenance work they had been doing prior to the August layoffs (J.A. 267, 274; 73, 74).

On these facts, the Board concluded that petitioner had violated Sections 8(a) (1) and (3) of the National Labor Relations Act by curtailing its operations and laying off its employees to force the Unions to abandon their contract demands (J.A. 295–296). It rejected petitioner's contention that the lockout was privileged under Board cases holding that lockouts were lawful to protect customers' property, prevent inventory spoilage, or guard the public safety from the effects of an imminent strike (J.A. 295).[3] Since the

[3] *E.g., Duluth Bottling Ass'n*, 48 NLRB 1635; *Betts Cadillac Olds, Inc.*, 96 NLRB 268; *Building Contractors Ass'n*, 138 NLRB 1405. The Trial Examiner had found the lockout privileged on this ground, and two Board members, who dissented, would have accepted this finding (J.A. 286–290, 301–305).

Unions had given numerous assurances that they would not strike and had promised that work in petitioner's yards would be completed, the Board concluded that petitioner could not reasonably have feared a strike. Consequently, the Board held that the lockout had been used by petitioner as an "offensive weapon" and, as such, was violative of the Act. It ordered petitioner to cease and desist and to reimburse certain laid-off employees for loss of pay (J.A. 295, 297–298).[4]

The court of appeals enforced the Board's order. Viewing the problem as one of balancing the legitimate interests involved, the court concluded that the balance struck by the Board was entitled to stand (Pet. 12–14).[5]

DISCUSSION

1. The court of appeals properly rejected petitioner's contention that the Board's findings inadequately spelled out the coercive and discriminatory impact of the lockout (Pet. 13, n. 1). No special circumstances distinguish this case from others in which the Board has explained why lockouts have such an effect. See, *e.g., Morand Bros. Beverage Co.*, 99 NLRB 1448, 1461–1466; *American Brake Shoe Co.*, 116 NLRB 820, 826. See also J.A. 296, n. 8 (citing cases). Conse-

[4] Since the complaint was restricted to the layoffs at petitioner's South Chicago yard, the backpay order was similarly restricted (J.A. 297–298).

[5] The court also rejected certain contentions of Local 374, International Brotherhood of Boilermakers, the charging party, seeking to enlarge the scope of the Board's remedial order, made in its petition for review. Those contentions are not relevant here.

quently, the Board was not required to repeat the same detailed findings here. See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 803–805.

2. (a) The question whether the lockout was unlawful turns on whether the Board properly balanced the competing interests involved. Lockouts during contract negotiations discourage collective bargaining by depriving employees of their livelihood on account of demands made by their representatives at the bargaining table. They interfere with the full enjoyment of the right to strike, by depriving the union of the opportunity to time the shutdown, an important attribute of the strike.[6] Since strikes, collective bargaining, and union activity are all "concerted activities" protected by Section 7 [7] and since lockouts during contract negotiations interfere with those activities, such lockouts fall within the literal ban of Section 8 (a)(1). They also violate the literal terms of Section 8(a)(3), for depriving employees of work in

[6] Protection of the right to strike is essential to the equality of bargaining power upon which the Act relies to preserve industrial peace. National Labor Relations Act, Sec. 1, pars. 2, 3. See 93 Cong. Rec. 3835, 2 Legislative History of the Labor Management Relations Act, 1947, 1007 (1948) (remarks of Senator Taft).

[7] See National Labor Relations Act, Sections 1, 7, 13; *Automobile Workers v. O'Brien*, 339 U.S. 454, 456–457, n. 3; *Amalgamated Association v. W.E.R.B.*, 340 U.S. 383, 389, 395, n. 21 Cf. *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665, 673, n. 8.

these circumstances is "discrimination"[5] which foreseeably discourages union membership and activity. On the other hand, lockouts, where not motivated by anti-union considerations, may also serve important, legitimate interests of employers. Thus, the "ultimate problem [in lockout cases] is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board* v. *Truck Drivers Local 449*, 353 U.S. 87, 96.

There are three groups of cases in which employers have locked out their employees for the purpose of attaining objectives in *bona fide* negotiations: (1) cases in which the employer locked out his employees in order to protect himself against a threatened strike which would result in unusually severe economic harm; (2) cases in which all the members of multi-employer bargaining unit closed their doors when the union struck one member in support of contract demands against all; and (3) cases in which the employer in a single company bargaining unit locked out in order to induce the union and the employees

[5] Detrimental treatment constitutes Section 8(a)(3) "discrimination" even if it is meted out equally to union members and nonmembers. See, *e.g.*, *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681 (C.A. 1) (lockout upon demand for collective bargaining); *National Labor Relations Board* v. *Stremel*, 141 F. 2d 317 (C.A. 10) (same); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (C.A. 2), certiorari denied *sub nom. Modern Mfg. Co.* v. *National Labor Relations Board*, 344 U.S. 816 (same).

to accede to his economic demands (the situation here).

The Board has consistently held that in the first situation the lockout serves a purely "defensive" purpose, and that, on balance, it is privileged (see cases cited in n. 3, p. 5, *supra*).

In the second situation the Board was originally of the view that the lockout could not be so justified, and that it was not privileged. *Morand Bros. Beverage Co.*, 99 NLRB 1448, 1461–1466; *Davis Furniture Co.*, 100 NLRB 1016; *Continental Baking Co.*, 104 NLRB 143. In 1954, however, the Board changed its view, concluding that a lockout in this situation served the legitimate defensive purpose of protecting the multi-employer unit against the divisive effects of successive strikes against each member of the unit individually. *Buffalo Linen Supply Co.*, 109 NLRB 447, sustained by this Court in *National Labor Relations Board v. Truck Drivers Local 449, supra.*

The third situation was not squarely presented to the Board until after the *Buffalo Linen* decision, but the Board, in its disposition of the first two types of cases, indicated that it would view a lockout by a single employer purely for bargaining purposes as unfair (see *Morand, supra*). That view was subsequently incorporated into Board decisions. See, in addition to the instant case, *American Brake Shoe Co.*, 116 NLRB 820; *Quaker State Oil Refining Corp.*, 121 NLRB 334; *Utah Plumbing and Heating Contractors Ass'n*, 126 NLRB 973; *Dalton Brick & Tile Corp.*, 126 NLRB 473.

In the Board's view a lockout by a single employer solely to advance his bargaining position, and not for "defensive" purposes, is not privileged. Such a lockout, as shown above, seriously intrudes upon legitimate employee interests, and this injury outweights any injury to the employer from denying him the weapon, particularly since there are other, less drastic means at his disposal for protecting his bargaining position. Thus, an employer may counter union bargaining demands by unilaterally changing working conditions once an impasse has been reached (*National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217), and may resist a strike by permanently replacing the strikers (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333); in the Board's view, the availability of these alternatives makes it unnecessary for him to resort to a lockout.

We submit that the Board's accommodation of the competing interests is reasonable and should not be disturbed. Accordingly, since the Board found that the lockout here was used only to advance petitioner's bargaining position,* the court below was correct in

*Substantial evidence supports the Board's finding that the lockout here was not "defensive." The Unions repeatedly assured petitioners that there would be no strike, guaranteed that any work in petitioner's yards would be completed, and offered to extend an existing contract containing a no-strike clause for six months or until a new contract was negotiated. Even when petitioner locked out its employees, the Union did not strike. In these circumstances, the Board properly found that petitioner could not reasonably have anticipated a strike, and that it locked out its employees merely to improve its bargaining position.

sustaining the Board's determination. The ruling below accords with that of two other courts of appeals to which the same issue has been squarely presented. *Quaker State Oil Refining Corp.* v. *National Labor Relations Board,* 270 F. 2d 40 (C.A. 3), certiorari denied, 361 U.S. 917; *Utah Plumbing & Heating Contractors Ass'n* v. *National Labor Relations Board,* 294 F. 2d 165 (C.A. 10).

(b) Most of the economic lockout cases which have thus far come before the Board have involved either multi-employer bargaining units—a situation now controlled precisely by *Truck Drivers, supra*—or circumstances in which the lockout was found justified in order to protect against unusual economic hardship.[10] The propriety of the use of the lockout as an "offensive weapon" in collective bargaining has not proved a major practical problem in the administration of the Act. The issue, however, is fundamental, and has generated considerable discussion.[11] The decision below appears to be in conflict with the decision of the Fifth Circuit in *National Labor Relations Board* v. *Dalton Brick & Tile Corp.,* 301 F. 2d 886. For, while the Fifth Circuit refused to "generalize in absolutes, or

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[10] Two members of the Board and the Trial Examiner thought that the instant case presented such a situation (see n. 3, p. 5, *supra*). And see *American Brake Shoe Co.* v. *National Labor Relations Board,* 244 F. 2d 489 (C.A. 7).

[11] See *e.g.,* Meltzer, *Single and Multi-Employer Lockouts Under the Taft-Hartley Act,* 24 U. of Chi. L. Rev. 70; Meltzer, *Lockouts under the LMRA: New Shadows on an Old Terrain,* 28 U. of Chi. L. Rev. 614; Koretz, *Legality of the Lockout,* 4 Syracuse L. Rev. 251; Koretz, *The Lockout Revisited,* 7 Syracuse L. Rev. 263.

cast the decision in doctrinaire terms of 'No Contract, No Work' " (*id.* at 892) and noted "that each case must be carefully measured by its own setting" (*id.* at 894), the main thrust of the opinion was to reject the Board's view that a lockout to obtain a bargaining advantage is, unless justified by special circumstances, a violation of Sections 8(a) (1) and (3). Furthermore, while *Morand Brothers Beverage Co.* v. *National Labor Relations Board,* 190 F. 2d 576 (C.A. 7) and *Leonard* v. *National Labor Relations Board,* 197 F. 2d 435 (C.A. 9) are clearly distinguishable (see, *supra,* p. 9), the philosophy expressed in those cases as to the basic status of the lockout under the Act is sharply at variance with the position taken by the Board here and in other cases.

In these circumstances, we do not oppose the granting of certiorari limited to the second question presented.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GEORGE B. DRIESEN,
Attorney,
National Labor Relations Board.
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OCTOBER TERM 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

WILLIAM B. BARTON
of
Vaughan, Brandlin, Robinson & Roemer
632 Shoreham Building
Washington, D. C. 20005
and
411 West Fifth Street
Los Angeles, California 90013

Attorney for
Chamber of Commerce of
United States as Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

This brief amicus curiae is submitted in support of the Petitioner by the Chamber of Commerce of the United States pursuant to Rule 42 (2) of the Revised Rules of the Supreme Court. The matter comes before the Court pursuant to an order on October 12, 1964, allowing certiorari after a judgment of the United States Court of Appeals for the District of Columbia entered on April 9, 1964, affirming a National Labor Relations Board decision and order issued on June 21, 1963.

The judgment of the Court below was entered on April 9, 1964, and is reported in 331 F. 2d 938. The decision and

order of the National Labor Relations Board are reported in 142 N. L. R. B. 133.

This Court derives jurisdiction under 28 U. S. C. 1254 (1) and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136.

The case involves directly Section 8 (d) (4) of the National Labor Relations Act as amended. It involves also Sections 203 (c), 206, 208 (a) and parts of Section 3 (a) both of said Act as amended and of the original National Labor Relations Act, 49 Stat. 449. These statutes are set forth in the Appendix.

THE QUESTION

The question before the Court, which is of very great concern to the Chamber of Commerce of the United States, hereinafter at times called amicus curiae, arises basically under Section 8 (d) (4) of the National Labor Relations Act as amended.[1] The question is whether the Act should be interpreted under the situation presented in this case to permit the lockout as a corollary of the right to strike.

INTEREST OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

The interest of the Chamber of Commerce of the United States in the question arises out of the obvious problem it presents to the Chamber's members. The Chamber is a federation with membership of more than 3700 State and local Chambers of Commerce and National and Local Trade Associations. It has an underlying membership of more than 4,000,000 business and professional firms and a direct membership of more than 31,000 business firms and business and professional people. Most of its members are employers in activities affecting commerce and are subject to federal labor laws. In this connection the right of

[1] This section of the Act is set out in the Appendix at page 20.

employees to strike has been quite fully elucidated both in the National Labor Relations Act itself and in National Labor Relations Board and Court decisions which have interpreted it. Section 13 of the Act, as amended, recites: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." On the other hand, although as later discussion shows, the Act recognizes the lockout, the circumstances under which employers may use it have been left in doubt. The Board's decisions in the area shift and are thus unpredictable[2]—perhaps because there are no standards for its guidance. When it holds a bargaining lockout illegal it tends to label the lock out an "offensive weapon", but when it holds one legal it tends to label it defensive in nature.[3] These labels completely fail to give reasonable certainty of results, but, it is submitted, are mere terms of convenience by which Board members or General Counsel for the Board subjectively conclude and urge that a specified lockout shall be struck down or upheld.

Employers are left in a quandry about the matter—being largely subject to the whim and caprice of the Board members, who are at times divided on the subject as in this case. This Court has indirectly recognized the problem, specifically observing in an earlier case before it that under the situation then presented it was "unnecessary to pass upon the question whether, as a general proposition, the

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[2] The Board conceded in its brief when it argued *Truck Drivers Local Union* v. *N. L. R. B.* before the Circuit Court of Appeals (C.A. 2) that prior to such case "a majority of the Board had interpreted the Act as precluding the non-struck members of an employer unit from utilizing a lockout." 231 F. 2d 110, 113 (1956).

[3] See *Lockout as a Bargaining Weapon*, 111 Univ. of Pa. Law Review 128 (1962).

employer lockout is the corollary of the employee's statutory right to strike." [4]

The Chamber of Commerce of the United States urges on behalf of its members that to have this issue resolved would promote stability in management-labor relations. Long ago its members by a vote of their delegates assembled in the Chamber's Annual Meeting expressed the view that the right to lockout should be equated with the right to strike.[5] The problem has moreover been a topic of discussion at meetings of the Chamber's Labor Relations Committee. Hence this amicus curiae brief is presented because of the unresolved nature of the issue and because of its significance to members of the Chamber of Commerce of the United States.

THE FACTS

Amicus curiae emphasizes that the facts in the case before the Court present a not uncommon bargaining problem. Employers commonly confront a similar situation—impasse and frustration in bargaining after the employer has made every effort to arrive at an agreement, has committed no unfair labor practice and in consequence has scrupulously obeyed Section 8 (d) (4).

All the facts are not detailed here because petitioner has ably done that. Some of the highlights are outlined below, however, because they demonstrate the soundness and legality of the course pursued by the company.

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[4] Footnote 19 in *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 93 (1957).

[5] See 1964-1965 Policy Declarations of Chamber of Commerce of the United States, p. 72, which states "The right to lockout should be equated with the right to strike."

THE REASONS FOR THE CLOSEDOWN

Actually plant operations had come to a virtual standstill by August 11th. The work on hand for customers had been completed and no new work was coming in. There were two causes of the work situation: (1) The Company deemed it unwise to take on new jobs in the face of the labor dispute that had developed. (2) The customers knew of the situation, having learned about it from various sources. Indeed Company spokesmen talked candidly to them about the unsatisfactory status of the labor dispute. Hence customers did not bring new repair jobs to the Chicago plant.[6]

These facts show that serious industrial realities confronted by the Company brought the closedown of August 11th. As a matter of sound business practice the Company wisely decided to close its Chicago plant.

There is substantial support for the trial examiner's findings "that Respondent was in a large measure motivated in discouraging orders and laying off its employees by its realistic appraisal of the economics of the situation."[7]

Furthermore, the employer had sound reason to close down on August 11th because of the bargaining situation.

As a cold collective bargaining proposition here are the salient facts confronted by the Company on the eve of its August 11th closedown:

(1) Twelve long and fruitless bargaining sessions. (R, p. 269.)[8]

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[6] Transcript of Record, pp. 273-280. In referring to the page numbers the letters J A (Joint Appendix) which precede the page numbers in the Transcript of Record itself are omitted in this and other references which follow.

[7] Ibid, p. 280.

[8] R. in this and some of the following references again indicates the printed Transcript of Record in the case, the page numbers being given in each instance.

(2) A refusal by the union leaders to submit the last Company offer to the membership, and at the same time a failure to make a counteroffer. (R, p. 269.)

(3) The overwhelming rejection by the employees of an earlier offer. (R, p. 264.)

(4) A strike in connection with each of the contract negotiations since 1952 (R, p. 269.)

(5) An offer to extend the contract six months, thus fixing the contract's termination in the midst of the Company's busy season when a strike would hurt it most. (R, p. 263.)

(6) Another offer to extend the contract indefinitely, thus leaving the union free as in the proposed six months' extension to call a strike during the busy season or at any other advantageous time. (R, pp. 270-271.)

(7) Strike votes taken by locals during the bargaining. (R, p. 269.)

(8) A wildcat strike in the Chicago yard in February, 1961. (R. p. 283.)

(9) A tie-up of a customer's valuable vessel by a strike during the 1955 negotiations. (R, p. 302.)

(10) Oral assurances that there would be no strike, but failure to assure the Company "that the men would not strike if necessary." (R, p. 271.)

In the face of this fact situation the Company representatives would have shown themselves naive and unfaithful to the trust imposed in them by the Company had they placed full credence in the oral assurances of no strike. This is not to brand the union spokesman as dishonest. He could have been sincere and meant what he said. But obviously he could not speak with authority for the employees as demonstrated by the fact of a wildcat

strike earlier in the year and such a promise made in good faith today could in the same good faith be abandoned tomorrow for what might seem to the promisor or the employees to be completely good reasons.

Thus the Company not only was justified in closing down for business considerations, but had good reason to close in order to avoid placing itself at a great strategic disadvantage with the Union in bargaining.

Board counsel has argued that the employer has bargaining weapons that make use of the closedown unnecessary to protect its bargaining position. The Board in this connection mentions the employer right "to protect and continue his business by supplying places left vacant by strikers." *N. L. R. B.* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 345 (1938). Board counsel also mentions employer freedom after a good faith bargaining impasse to institute unilaterally changes in employment terms that were rejected by the employees during negotiations. *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217 (1949). Amicus curiae submits that although these two employer rights theoretically exist, their practical use presents great difficulties. To make replacements during a strike almost inevitably invites serious industrial warfare including picket line violence and a struggle to control the plant entrance. In addition it is always difficult and costly to train and put new employees to work. The step is especially a difficult and costly one if the replacements are likely to be used for only a short period of time. Similarly to make unilateral changes in the terms and conditions of employment invites trouble. By its very nature such action infuriates strong union proponents. It can thus gravely complicate problems with the union once bargaining is resumed.

THE CLOSEDOWN LAWFUL

The closedown of August 11, 1961, must be judged against the above background and was lawful whether effected for business reasons or to meet the bargaining developments.

Economic considerations as explained above were such that they could well have been the controlling motive of the Company in deciding to suspend its Chicago operations. To close an operation for such reasons is not an unfair labor practice.[9]

If it is assumed, however, that the closedown was effected as a weapon in the bargaining situation, it was nevertheless not an unfair labor practice but a lawful act.

In order for the closedown of August 11th to be proscribed under the National Labor Relations Act it would be necessary that it constitute unlawful conduct *per se* because no other conduct than the closedown itself is alleged or claimed to have been an unfair labor practice.

LEGISLATIVE HISTORY

The right of an employer to use the lockout was clearly embodied in common law and as a practical matter it was viewed as a corollary of the employees' right to strike. The common law concept was sufficiently broad to include discharge of employees for any reason whatever.[10] The right was viewed as something employers were free to exercise in concert and in fact an association member

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[9] *E-Z Mills*, 106 N. L. R. B. 1039 (1953); *Seaboard Packing Co.*, 107 N. L. R. B. 1295 (1954); *Renton News Record*, 136 N. L. R. B. 1294 (1962).

[10] *Iron Moulders' Union* v. *Allis-Chalmers Co.*, 166 F. 45, 50 (C.A. 7 1908).

See also *Legality of Lockout*, Prof. Robert F. Koretz, 4 Syracuse Law Review 249, 255, (1953).

who failed to cooperate in lockout activities could be penalized.[11]

Events at the time Congress was considering the Wagner Act indicate that it purposely avoided making any specific change in the common law principle. Legislative history in fact indicates that Congress recognized and contemplated use of it when it enacted the original National Labor Relations Act, known as the Wagner Act, in 1935 and the Amendments of 1947, commonly called the Taft-Hartley Act. When Senator Wagner's original version of the Wagner Act was before Congress for Consideration, Section 5 (1) would have made it unfair labor practice for an employer "to attempt, by interference, influence, restraint, favor, coercion, or lockout, or by any other means to impair the right of employees guaranteed in Section 4."[12]

Thus, even though the original bill would have proscribed use of the lockout only to defeat protected activities, there were objections that such proscription was unfair inasmuch as the right to strike was protected. The subsequent bills introduced by Senator Wagner, including the version which became law, omitted express reference to lockouts.[13] This legislative history of the Wagner Act

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[11] See *Associated Hat Manufacturers* v. *Baird—Unteidt Company*, 88 Conn. 332 (1914).

Also see *Organized Labor* (1st ed.) by Millis & Montgomery, p. 555.

[12] See Sen. 2926, 73rd Con., 2nd Sess. 5 (1934), See also *Lockouts under the L. M. R. A.*, Meltzer, 24 Univ. of Chicago Law Review, 70, 79 (1956).

[13] See Wagner Act, 49 Stat. 449 (1935). Commenting on the problem, Professor Meltzer says that "while this legislative history scarcely supports the right to resort to bargaining lockouts, it does foreclose the use of Section 13 as support for their proscription." cit. op. *supra* footnote 12.

indicates that Congress had no intentions of outlawing lockouts *per se.*[14]

The only specific references to the lockout were subsequently embodied in the 1947 Amendments of the National Labor Relations Act. Section 203 (c) for instance spells out the duties of the Director of the Federal Mediation and Conciliation Service as including efforts to obtain settlements of disputes without resorting to strike, lockout or other coercion. Section 206 makes the national emergency provisions applicable to both strikes and lockouts, and Section 208 specifies that the national emergency injunction shall be applicable to both strikes and lockouts.[15]

Section 8 (d) (4) imposes obligations on the respective parties not to strike or lockout during the bargaining period which follows notice by either of a desire to modify or terminate a contract. Indeed, this provision is the only one either in the original Wagner Act or in the Act as later amended which specifically proscribes in any way the use of the lockout. Accordingly, this quite limited proscription of its use is a strong indication that Congress at the time of the enactment of the National Labor Relations Act Amendments in 1947 saw no need to change the long recognized principle which gave validity to employer use of the lockout.

In all this recognition of lockouts, however, Congress has at no time set forth a statutory definition.

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[14] *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, cit. *supra* footnote 4. See also 79 Congressional Record 7673, where Senator Walsh, as spokesman for the bill, in explaining it referred to "some fundamental rights an employer has." In describing them he said "No one can compel an employer to keep his factory open."

[15] See Legislative History of the Labor Management Relations Act, 1947, Vol. 2, p. 1206; also see appendix for exact wording of the statutory provisions mentioned in this and the next paragraph.

THE N. L. R. B. AND LOCKOUTS

The National Labor Relations Board, like Congress, has not defined the term "lockout". One of its trial examiners observed in the case of *Betts-Cadillac Olds, Inc.*, 96 N. L. R. B. 268, 282 (1951), that the Board "does not appear to have defined the term, and Board decisions do not reflect any consistent definition."[16]

Against this background the National Relations Board has assumed an implied authority to impose its own views about the use of the lockout. It may or may not uphold the lockout, the determination being made without benefit of standards for guidance, but rather being based on the

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[16] The same trial examiner referred in this case to the following "widely separated" concepts of the lockout as having been used by the Board:

A closedown to avoid property loss, *Duluth Bottling Association*, 48 N. L. R. B. 1335 (1943);

A closedown because of the effect of sporadic strikes, *International Shoe Company*, 93 N. L. R. B. 907 (1951);

A closedown in a fit of employer temper in arguing with union representative, but with no anti-union purpose, *Lengel-Fencil Co.*, 8 N. L. R. B. 988 (1938);

Mass discharges as a reprisal against union activity, *Hopwood Retinning Co.*, 4 N. L. R. B. 922 (1938), *Scott Paper Box Co.*, 81 N. L. R. B. 535 (1949).

This trial examiner also pointed out in the case of Betts-Cadillac Olds, Inc. that in certain cases shutdowns for economic consideration have not been termed lockouts, referring as examples to *Link-Belt Co.*, 26 N. L. R. B. 227, 261-264 (1940); *Hobbs, Wall and Company*, 30 N. L. R. B. 1027 (1941); *Worthington Creamery & Produce Co.*, 52 N. L. R. B. 121 (1943). He observes that "the decisions reflect no invidious connotation in use of the term", mentioning the *Duluth Bottling Association, International Shoe Company* and *Lengel-Fencil Company cases* as lockouts found to be legal. He cites the *Hopwood Retinning Co.* and *Scott Paper Box Co. cases* as examples of ones found illegal.

opinions of Board members as to whether the employer is entitled to use it for defensive purposes.[17]

In upholding a lockout this Court recognized the distinction between the one it found lawful and those in another group that had been held unlawful. The Court observed:

> "We are not concerned here with the cases in which the lockout has been held unlawful because designed to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain."[18]

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[17] Among cases illustrative of such Board decisions are *N. L. R. B.* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886 (C.A. 5 1962); *Morand Bros. Beverage Co.* v. *N. L. R. B.*, 190 F. 2d 576 (C.A. 7 1951); *Betts Cadillac Olds, Inc.* cit. *supra* p. 11; *American Brake Shoe Co.*, 116 N. L. R. B. 820, enforcement denied, 244 F. 2d 489 (C.A. 7 1957); *N. L. R. B.* v. *Truck Drivers Local etc.* cit. footnote 4 *supra*; *N. L. R. B.* v. *Insurance Agents Intl. Union*, 361 U.S. 477 (1960); *Local 357 Teamster Union* v. *N. L. R. B.*, 365 U.S. 667 (1961). For a discussion of the point see *Lockout as a Bargaining Weapon*, cit. footnote 3 supra.

[18] *N. L. R. B.* v. *Truck Drivers Local Union No. 449*, cit. footnote 4 *supra*. For illustrations of lockouts found illegal for reasons similar to those mentioned by the Court see: *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. 2d 652 (C.A. 9 1939); *Salant & Salant, Inc.*, 66 N. L. R. B. 24 (1946); *Port Gibson Veneer & Box Co.*, 70 N. L. R. B. 319 (1946), enforced as modified, 167 F. 2d 144 (C.A. 5 1948), cert. denied, 335 U.S. 819 (1948); *Williams Coal Co.*, 11 N. L. R. B. 579 (1939); *N. L. R. B.* v. *Hopwood Retinning Co.*, 98 F. 2d 97 (C.A. 2 1938); *N. L. R. B.* v. *Anchorage Business Men's Assn.*, 289 F. 2d 619 (C.A. 9 1961); *Quaker State Oil Refining Corp.* v. *N. L. R. B.*, 270 F. 2d 40 (C.A. 3 1959), cert. denied, 361 U.S. 917 (1959). See also Article mentioned footnote 12 *supra* in 24 Univ. of Chicago Law Review 70, 72 (1956) by Prof. Bernard D. Meltzer in which he states:

> "These cases involve lockouts designed to frustrate organizational efforts, to destroy or undermine the bargaining representative or to evade the duty to bargain. In such situations the basic vice is not the lockout as such, but the fact that its purpose is plainly incompatible with the rights to organize or to bargain collectively, which are protected by the Statute. These illicit lockouts are plainly distinguishable from the bargaining lockout."

The Board itself has definitely recognized that the employer, in the absence of a purpose to evade bargaining and defeat its employees' union activity, is free to close down its operations. It has stated: "We recognize that an employer may lawfully discontinue or reduce operations for any reason whatsoever, good or bad, sound or unsound, in its sole discretion, and without censorship from this Board, *provided only that the employer's action is not motivated by a purpose to interfere with and defeat its employees' union activities.*"[19]

NO UNFAIR MOTIVE IN CLOSEDOWN

The Company in the case before the Court complied with Section 8 (d) (4). The background of the August 11th, 1961, lockout as disclosed by the record and as outlined above shows clearly moreover that the closedown was not motivated by a desire to avoid bargaining or to destroy unionization. The facts support the exact opposite conclusion. There is complete lack of any unfair labor practice background, so much so that no unfair labor practices independent of the lockout of August 11th are even alleged. The entire case rests on the proposition that the closedown itself constituted a violation of portions of the Act.

Affirmatively the facts show that the employer during the entire 1961 series of event constantly bargained in good faith as it had done with the same unions since 1952. Indeed, Chairman McCulloch and Board Member Rogers in their dissent point out that "it was Respondent who requested the early opening of contract negotiations so that timely agreement might more easily be reached.[20] Amicus

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[19] *Pepsi Cola Bottling Co.*, 72 N. L. R. B. 601, 602, (1947). It is submitted that the principle thus stated, moreover, is sound and will continue of necessity to be basically sound whether modified or not as a result of the decisions in *Fibreboard Products Corp., Petitioner*, v. *N. L. R. B., Respondent*, (cert. granted) 375 U.S. 963 (1964), and other cases now pending.

[20] R. 301.

curiae emphasizes that the employer proceeded as the negotiations moved forward, to observe faithfully the obligations imposed by Section 8 (d) (4) of the Act. During the two months prior to the closedown it engaged in more than twelve bargaining sessions with the union. The trial examiner found that sometimes these sessions lasted into the early hours of the following morning.[21] The employer continued to bargain even though the employees overwhelmingly rejected an offer made by it on July 31st. It made a further offer in a meeting on August 9th, but the negotiators for the union rejected it and did not even submit it to the employees.[22]

BOARD EXCEEDED AUTHORITY

The N. L. R. B in declaring the closedown of August 11th unlawful was under the circumstances of the case assuming powers not granted by Congress.

The Board powers are clearly derived from statute, it having been created by Section 3 of the National Labor Relations Act in 1935 and continued under Section 3 (a) of the Act as amended in 1947.[23]

It is fundamental under its statutory authority that the Board together with its General Counsel and its trial examiners does two things: (1) it determines questions of representation, holding elections when necessary to make such determinations; and (2) it decides cases involving charges of unfair labor practices.[24]

The Board relies on a claimed need to balance conflicting interests as a reason for the authority assumed in rend-

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[21] R. 269.

[22] Ibid.

[23] See Appendix.

[24] See N. L. R. B. publication, "*A Layman's Guide to Basic Law under the National Labor Relations Act*, by Stuart Rothman (at the time) General Counsel of the N. L. R. B.

ering the decision made by it in this case. In its brief before the U. S. Court of Appeals for the District of Columbia, it states that (referring to situations where employer's conduct in lockout cases has been found lawful): "They entail in effect a balancing of these conflicting interests—a determination in particular situations whether the employer interest involved requires that his action be privileged even though it results in some sacrifices of employee rights. It is precisely this kind of balancing that the the Board employs to determine whether or not lockouts are lawful." The Board cites as authority *N. L. R. B.* v. *Truck Drivers Union Local Union No. 449.*[25]

CONCLUSION

Doubtless, the Board at times feels strongly that it should impose this or that rule of law even though lacking statutory authority. In examining the question of bargaining in good faith the Board, for instance, has shown an inclination to ban certain practices that it deems show a contrary purpose. The Board in this connection has at times so acted regarding slowdown and quickie strikes. It has been suggested in discussing this Board practice that "it is not enough for the N. L. R. B. to express its moral judgment or even community sentiments. To say 'there ought to be a law against it' does not demonstrate the propriety of the N. L. R. B.'s imposing the prohibition."[26]

Regarding the Board's efforts similarly to regulate the choice of economic weapons to be used this Court has said:

> "Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if

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[25] Cited *supra*, footnote 4.

[26] *The Duty to Bargain in Good Faith*, Archebald Cox (then) Prof. of Law, Harvard Law School, 71 Harvard Law Review 1401, 1437 (1958).

> the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results in negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union."[27]

In the case of *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, cit. *supra* footnote 17, the Court of Appeals, specifically mentioning Section 8 (d) (4), referred to the lockout as "a corollary of the union's right to strike. Consequently, once petitioners had exhausted the possibilities of good faith collective bargaining with the Union through their Associations, any or all of them were free to exercise their right to lock out their salesmen without waiting for a strike. just as the Union was free to call a strike against any or all of them."

The principle there stated is sound. The case was one of group bargaining. No good reason is apparent why it does not apply with equal force, or at times with more force, in cases where a single employer copes with a powerful union or group of unions.[28]

In the case before the Court amicus curiae emphasizes that there is nothing whatever in the record to show union

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[27] *N. L. R. B.* v. *Insurance Agents*, cit. *supra* footnote 17.

[28] A remand and ultimate finding against the employer of course took place in the *Morand case*, 204 F. 2d 529 (C.A. 7 1953), cert. denied, 346 U.S. 909 (1953), rehearing denied 346 U.S. 940 (1954). The result was largely because of a finding that the salesmen had been discharged, not laid off Hence the final decision was consistent with the principle set forth above

animosity on the part of the employer—nothing to show a purpose to destroy the union or evade bargaining. Section 8 (4) (d) was scrupulously observed. There had been good faith bargaining with the unions involved since 1952.

As a matter of fact a decision in this case that the employer cannot use the lockout would in practical effect completely proscribe its use by a single employer for most bargaining purposes.

By oral assurances of no strike, the union representative could forestall employer self-help by a closedown. He could continue this situation to his own liking and in turn the union could precipitate a strike crisis on the employer when it would be most disastrous to the business. Employers large and small would stand helpless to protect themselves. The result would be especially unjust to employers such as the petitioner, who have an exemplary record of bargaining with unions.

Few employers would have the temerity to challenge the rule, not only because of the costliness of litigation but also because of likely sizeable back-pay awards.

To state the result another way there would be a complete and unfair imbalance in bargaining. Unions would continue to be broadly protected in using the strike as a bargaining device, but employers even though completely free from a record of unfair labor practices would be foreclosed from using the lockout for the same purpose.

The employer in the case at hand had as much right to effect the closedown of August 11, 1961, as the union had to strike. Amicus curiae respectfully submits that this Court should so determine; that it further should deny enforce-

ment and set aside the National Labor Relations Board order in the matter dated June 21, 1963.

WILLIAM B. BARTON
of
Vaughan, Brandlin, Robinson & Roemer
632 Shoreham Building
Washington, D. C. 20005
and
411 West Fifth Street
Los Angeles, California 90013

Attorney for
Chamber of Commerce of
United States as Amicus Curiae

APPENDIX

Relevant Sections of National Labor Relations Act as Amended (June 23, 1947) 61 Stat. 136

Section 203 (c):

> If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

Section 206:

> Wherever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall make its contents available to the public.

Part of Section 208 (a):

> Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having juris-

diction of the parties to enjoin such strike or lockout or the continuing thereof .....

Section 8 (d) (4)

(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

.....

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a

contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the six-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Part of Section 3 (a)

The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States . . . . . .

. . . . . .

Part of Section 3(a) of Original National Labor Relations Act (July 5, 1935) 49 Stat. 449

There is hereby created a Board, to be known as the "National Labor Relations Board (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate

. . . . . .

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE AMERICAN SHIP BUILDING COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals (R. 323-325) is reported at 331 F. 2d 839. The decision and order of the Board (R. 292-308) are reported at 142 NLRB 13[illegible].

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1964 (R. 326, 327). The petition for a Writ of Certiorari was filed on July 6, 1964 and was granted October 12, 1964, 379 U.S. ——, (R. 327). The jurisdic-

tion of this Court rests upon 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether, under Section 8(d)(4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' right to strike?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.), are set forth in the Appendix infra, pp. 26-29.

SUMMARY OF PROCEEDINGS BELOW

The American Ship Building Company is engaged in shipbuilding and ship repair at its four shipyards located in Chicago, Illinois, Buffalo, New York, Lorain and Toledo, Ohio (R. 259).

On October 24, 1961, Local 374, the Chicago local of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers charged the Company with violating Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act, as amended, because after an impasse had been reached in negotiations for a new employment agreement it had locked out its employees (R. 1-4).

A hearing was held in February, 1962 by a Trial Examiner of the National Labor Relations Board who on May 31, 1962 recommended that the complaint be dismissed in its entirety (R. 259-291). The Board on June 21, 1963 by a three to two decision, with Chairman McCulloch and member Rodgers dissenting, held the Company in violation of Sections 8(a)(1) and 8(a)(3) of the Act but dis-

missed the charges of Section 8(a)(5) violations (R. 292-308).

The U.S. Court of Appeals for the District of Columbia Circuit on April 9, 1964 affirmed the decision of the Board; the Board had concluded that the issues were limited to employees in the Chicago shipyard of petitioner (R. 323-325).

STATEMENT OF FACTS

Introduction

All of the shipyards of the Company are adjacent to the Great Lakes. The busy season is between November and April when the Lakes are frozen over and during this period shipowners try to get necessary repairs so that they can operate on the Lakes during the ice-free months (R. 272; 74, 156). In the summer months a skeleton crew of employees is retained to perform yard maintenance, emergency repairs, and to prepare for the winter (R. 273; 74, 78, 191, 213). Accordingly, the Company attempts to have its employment agreement expire on August 1st, so that its customers will not refrain during the winter from bringing in their ships for repairs because of fears of delay due to strikes (R. 285). A strike during the busy November—April season would be an economic disaster for petitioner and for its shipping industry customers.

The Company had a collective bargaining agreement with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers and seven other craft unions which expired on August 1, 1961 (R. 260-261).

In its past bargaining with the Company, the Unions had struck in 1952, 1953, 1955, 1956 and 1958—on each occasion when the collective bargaining agreement was up

for renewal. There had been five strikes in eight years with the 1958 strike lasting ten weeks (R. 147, 262). In addition, there had been two "wildcat" strikes in 1961 (R. 66, 68). In 1955 a slowdown by employees, before the employment agreement expired, caused an 8-million dollar ship to be caught in petitioner's shipyard and lost to its customers for 3 weeks during the customer's busiest season because of the ensuing strike (R. 149, 272).

In December, 1960, over seven months before the expiration of the employment agreement on August 1, 1961, officials of the Company expressed to representatives of the Unions the desire of the Company for early meetings with the Unions to reach an agreement prior to the termination date of the existing employment contract (R. 50-51).

A. *Negotiations Before the Layoff*

In May 1961 the Union and the Company exchanged proposals for a new contract. The first bargaining session was held on June 6, 1961 in Cleveland, Ohio with representatives of all parties present. Bargaining continued in earnest at subsequent meetings of the parties held on June 19, 20, 21, 22 and 23, July 5, 6, 19, 20, 28, 29, 30, 31, 1961 (R. 25, 26, 262-264).

At the first meeting on June 6, 1961, the Executive Vice President of the Company stressed the extremely poor business conditions facing the shipbuilding industry on the Great Lakes at that time. (The deteriorating condition of the ship construction industry on the Great Lakes was fully explained to the Union representatives on many occasions.) He requested that rates of wages be kept constant until competitors' rates (which were, in at least one instance, as much as 42¢ per hour less than petitioner's) caught up with those paid by the Company. At the same meeting the Unions' chief negotiator stated that he under-

stood there had been a strike during each and every negotiation but he hoped the parties could reach agreement without a strike. Oral assurances that work would be completed by employees were also given by local Union representatives (R. 53, 54, 98, 110, 137-39, 262).

Negotiations continued through June. On June 20 the Union requested fringe benefits estimated by the Company to cost 28¢ per hour and by the Unions 20¢ per hour. On July 5 and 6 the Unions revised downward some of their fringe benefit requests but added a request for 10¢ per hour for pensions. On July 6, the Company suggested that the Federal Mediation Service be called in (R. 262, 263).

At a meeting on July 19, the Unions demanded an across the board wage increase of 20¢ per hour in addition to other fringe and pension benefit requests (R. 263-264). Also, on July 19, the Unions proposed a six-month extension of the agreement but the Company refused because the contract would then expire in its busiest season when it would be most vulnerable to strike action (R. 263-264, 271). During the July 20 meeting, while discussing wages, the Unions' chief negotiator sharply reminded the Company representatives that in 1958 it had also pleaded financial inability to pay a wage increase but that after a 10 or 12 weeks strike it had yielded and submitted to the Unions' demand and had not been forced out of business. He added that the Unions did not wish to strike (R. 57, 263-264, 271).

On July 31, the last day of the existing labor contract five or six major issues primarily wage and fringe monetary benefits remained in disagreement. The Company presented two proposals but the Unions rejected both and then made a counter-proposal which the Company in turn rejected. The Company asked that its proposals be sub-

mitted to the employees for a vote and the Unions agreed but said they would not recommend their adoption. The Company refused to extend the old contract until a new one was agreed upon but the parties then agreed to an extension of the old contract until the membership of the Union could vote on the Company's proposals. (J.A. 34-35, 112-113, 264). The employees continued to work after the contract expired (J.A. 37, 144).

On August 8 the Unions informed the Company that its proposals had been rejected by a vote of their members. The Union representative in response to an inquiry from the Company representative said the Unions did not then intend to strike (R. 264). On August 9, the parties met again and the Company made another offer of a three year contract with a wage increase of 5¢ per hour each year of the contract. *The Unions refused to submit this offer to their members for a vote and made no counter proposal.* Plans for further meetings were left unsettled. *An impasse in the bargaining had been reached* (R. 265).

Prior to the expiration of the contract on August 1, 1961, some of the Unions had authorized a strike by an overwhelming vote (R. 58). The Company thus had a sound foundation for its fear of a strike on the part of the Unions (R. 263, 271). This fear was evidently shared by the Conciliation Commissioner of the Federal Mediation Service (R. 60) who requested assurances from the Unions that no precipitous strike action take place. The request was not answered until August 2,—after the expiration of the labor agreement—and the assurance then given was limited to a promise that no strike action would take place before a meeting scheduled for August 7, 1961 (R. 257).

The Company representative said that throughout the negotiations no one had been heard to say that the Unions

would not strike (R. 177-178). The Chief Negotiator for the Unions admitted *that despite his oral assurances that there was no intention to strike, it was debatable whether he could have stopped the Union locals from calling a precipitous strike* (R. 66, 271).

B. *The Layoff and Subsequent Events*

After a meeting of Company officials on August 10, action was taken by petitioner on August 11, 1961 to close down its operations and temporarily lay off its personnel in the Chicago and Toledo shipyards, where no jobs of importance were on hand. The last vessel on which repairs had been made had left the Chicago shipyard some three weeks prior to the closedown of August 11, 1961 (R. 74, 148, 151, 272, 273, 274, 303). In Buffalo, men were to be laid off as the work was completed. A large vessel was being worked on in the Lorain shipyard and the work force there was retained with gradual reduction and layoffs as the work was completed (150-151, 243-247, 272). The layoff notices given employees gave the cause of the action as "the labor dispute which has been unresolved since August 1, 1961"[1] (R. 265-266).

The Mediation Service called further meetings of the parties on August 19, 20 and 28 when the Company made new proposals and the Union rejected them. The deadlock continued primarily because the Unions refused to accede to an August 1st termination date for any new contract. (R. 266-267).

Further meetings were held on October 20, 21 and 22. On October 27, 1961 a final agreement for a two year contract expiring on August 15, 1963 was agreed upon

[1] The layoff notices were worded in this manner because of legal provisions of the unemployment compensation statutes of Ohio, New York and Illinois (R. 267, 129-131, 290-291).

and signed. Despite the fact that the Company negotiator was informed on the morning of October 27 that unfair labor practice charges had been filed against the Company, he attended the meeting scheduled for that morning and executed the new contract just as it had been agreed upon. (R. 267, 65, 131). Immediately after the new labor agreement was executed on October 27, 1961, the employees at the Chicago shipyard were called back to their jobs thus ending the temporary layoff. (R. 73-74, 267, 274).

C. *The Board's Decision and Order*

The Board, with Chairman McCulloch and Member Rodgers dissenting, disagreed with its Trial Examiner and found that the Company had violated Sections 8(a)(1) and 8(a)(3) of the Act. The Board stated in part:

> ". . . where the Union has given the employer assurances that no sudden strike would be called, or that, in the event a strike were called, adequate safeguards would be taken by the Union to protect the employer's facilities and work commitments during the course of the shutdown, a lockout is illegal; for in such a situation the lockout is deemed an offensive weapon intended to force the abandonment of the Union's contract demands and the acceptance of the employer's (R. 295-296).

The Company was ordered to cease and desist from its unfair labor practices and to reimburse its employees at the Chicago shipyard for lost pay (R. 298-300).

The Court of Appeals directed that the Board's order be enforced (R. 323-325).

SUMMARY OF ARGUMENT

The entire industrial relations structure in this country is based upon a system of free collective bargaining. The objective of collective bargaining is to secure an employment agreement between labor organizations and management. The pressures, strategy and tactics utilized by the parties to secure this objective have often required the use of strikes and lockouts. They were permitted before the Wagner and Taft-Hartley Acts and are not now barred by provisions of those Acts except under certain limited circumstances.

The National Labor Relations Board and the Courts have held lockouts to be legitimate under the Taft-Hartley Act in a multi-employer bargaining situation, and in cases where unusual economic hardship is involved.

The Board's position on lockouts has been inconsistent and vacillating. In the early days after Congress passed the Taft-Hartley Act it held multi-employer lockouts illegal even though union "whipsaw" strike tactics had been used. Then it gave approval to the legality of such lockouts which was approved by this Court. It has also said that lockouts to avoid unusual economic hardships and special operational problems may be lawful under certain circumstances. On the other hand, it has held bargaining lockouts when an employer seeks to exercise economic pressure on the Union to accept his demands to be offensive tactics which it contends are illegal under the Act.

The Board characterizes a bargaining lockout as offensive action which infringes upon the strike and other concerted Union activity which it contends are protected under Section 7 of the Act. The Board asserts that where such a lockout takes place it has the function of resolving the conflict between the legitimate interests of the parties.

What is most significant here, however, is that the Board has failed to explain why a lockout in a multi-employer situation *fails* to infringe upon protected concerted activities, while in a single employer lockout *it does*. Likewise, the Board has not suggested how a discharge and replacement of economic strikers (which has been held to be legal) harmonizes with its view that a temporary layoff if directed by a single employer is illegal, and if directed by a multi-employer unit is legal. Indeed, the Board even continues to claim that it has the power to decide how much, when and what kind of economic pressure an employer can use to secure agreement on his bargaining demands despite a decision of this Court which clearly states that it has not been delegated power to act as an arbiter in such a situation.

ARGUMENT

I

A LOCKOUT IS NOT ILLEGAL PER SE AND, INDEED, IT IS AN INTEGRAL AND NECESSARY PART OF AN EQUITABLE COLLECTIVE BARGAINING PROCESS.

A. *A lockout is not illegal per se.*

While no specific statutory provision is violated by an employer's lockout action[2], the National Labor Relations Board has generally sought to condemn such conduct. It has been the Board's view that the strike and other concerted actions of a labor organization are "protected" under Section 7 of the Act and that a lockout is a reprisal

[2] *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 92.

for and infringes upon the employees' resort to such activities and is therefore contrary to the statutory purposes of the Act.[3] This is the basic position of the Board as to a single employer lockout such as is here involved. But this position is qualified by various exceptions which plainly reveal the error and inconsistency of the Board's interpretation of the Act.

The Board's erroneous position on individual employer lockouts is in stark contrast with its position on the legality of lockouts where multi-employer bargaining is involved. If a number of employers in an industry bargain jointly with a Union for a master contract and if an impasse is reached in the bargaining and the Union strikes one employer of the bargaining unit, the other companies in the bargaining unit can legally lockout their employees to avoid what is popularly known as the "whipsaw" effect which occurs when individual employer members of the bargaining unit are struck one at a time by the Union.[4] The Board[5] and this Court have given approval to the legitimacy of such a lockout under the Taft-Hartley Act in *NLRB* v. *Truck Drivers Local Union No. 449* 353 U.S. 87.

Moreover the Board has recognized as another valid exception to its basic rule a lockout by which an employer

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[3] It is well-accepted law (*NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333) that an employer can lay off and replace economic strikers with permanent replacements. Is not such action equally a reprisal for protected concerted activity? Actually, replacement of strikers and attempts to operate a plant with strikebreakers may well lead to violence, whereas a lockout avoids such problems.

[4] Why a multi-employer lockout fails to interfere with the Unions' protected right to strike while a single employer lockout constitutes such interference is not only difficult to perceive but also appears to deny to single (and in most instances small) employers the equal protection of the law.

[5] *Buffalo Linen Supply Co.*, 109 NLRB 447.

seeks to avoid extraordinary economic or operational losses threatened by an imminent strike.[6]

These distinctions which the Board has attempted to draw between legal and illegal lockouts under the Taft-Hartley Act are completely unrealistic but they do point up the fact that even the Board agrees that a lockout may be legal. Certainly there is nothing in the statute which says that a strike which will cause an employer great or unusual loss permits him to take an action which would be unlawful if the strike involved only minor inconveniences. And, yet, this is the rule of law enunciated by the Board. We submit that it is unsound to hold that the degree of hardship enforced should be the criterion for judging an employer's right to resort to the protection afforded him by a lockout.

B. *The right to lockout is an integral part of an equitable collective bargaining process.*

The objective of the mutual bargaining effort of both labor organizations and employers is to secure the most favorable employment contract possible. Economic pressure through the use of the strike or the lockout is and has always been normal and permissive in collective bargaining.[7] It could not function fairly and effectively unless this was the case. The lockout however, must be used to secure the economic advantages available to an employer, to protect his business and to counter the economic strength of the adversary in the bargaining process,

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[6] *Duluth Bottling Association*, 48 NLRB 1335 (1943); *International Shoe Co.*, 93 NLRB 907 (1951); *Betts Cadillac*, 96 NLRB 268 (1951); *Packard Bell Electronics Corp.*, 130 NLRB 1122 (1961); *Building Contractors of Rockford*, 138 NLRB 1432 (1962); *Associated General Contractors*, 138 NLRB 1405 (1962).

[7] *NLRB* v. *Insurance Agents International Union, AFL-CIO*, 361 U.S. 477.

but it would be violative of Section 7 of the Act if it were used to frustrate the organizational efforts of a labor union or to discourage membership in the union. In the instant case, the lockout of the American Ship Building Company was in no sense anti-union but purely an effort to preserve and protect the business of petitioner.

That the countervailing weapons of strike and lockout are used by unions and employers to protect their respective interests is well recognized and accepted. In their work, *Organized Labor,* (1945) Millis (a former Board Chairman) and Montgomery state (p. 554):

> "In exerting pressure upon employers to recognize them and accept their demands, unions . . . resort to the strike. . . . The employers resort to corresponding methods—the *lockout* . . . .
>
> "The strike has been and is organized labor's great weapon when differences are not settled by conciliation, mediation, or arbitration. From its use or threatened use the union obtains most of its power in the industrial field. *Its counterpart on the employer's side and matching it fairly accurately, is the lockout.*" (Italics supplied).

The history of the lockout's use shows that it has been a legal weapon of employers for many years. Prior to the Wagner Act [8] the lockout was practiced without legal restriction by single employers or voluntary associations of interested employers. In the case of *Iron Molders Union* v. *Allis Chalmers Co.,* 166 F. 45, 52 the Seventh Circuit, in 1908 held that employers may use the lockout at will and that the right to its use by employers paralleled the right of employees to strike.

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[8] 49 Stat. 449.

The general understanding of industry and labor as to the permissibility of the use of lockouts in collective bargaining is evidenced by a report entitled, *Basic Patterns in Union Contracts*, issued by the Bureau of National Affairs in April 1961; based on a sample of 400 collective bargaining contracts in force in 1960 the report states at page 77:1,

> "Some form of no-strike clause appears in about 94 percent of union contracts . . . Ordinarily, no strike pledges are paralleled by similar pledges from management regarding lockouts. These appear in 84 per cent of contracts, up from 76 per cent in 1957."[9]

Section 8(d) of the National Labor Relations Act, as amended by the Taft Hartley Act defines the terms "to bargain collectively" and sets forth the steps which must be taken by a party to a collective bargaining contract in order to modify or terminate the contract. After setting forth some of the steps which must be taken, Section (d) provides in sub-paragraph 4:

> . . . [the party desiring termination or modification shall] continue(s) in full force and effect, *without resorting to strike or lockout*, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." (Italics supplied).

This obvious recognition of the validity of a lockout is strongly supported by the legislative history underlying

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[9] To the effect that most collective bargaining contracts contain a "no strike-no lockout" provision, also see Bulletin 908-13, Bureau of Labor Statistics, pp. 1-3.

Section 8(d)(4) and other sections of the Act.[10] It should be noted that one of the major objectives of the Taft Hartley Act was to insure employers and employees complete equality of rights and responsibilities in the field of collective bargaining. A denial of the right to lockout would frustrate the equality of rights which it was the purpose of the Act to achieve.[11]

This Court in *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87, 92, 93 more recently held that neither the Wagner Act nor the Taft Hartley Act prevented the use of the lockout by employers. Mr. Justice Brennan at pages 92 and 93 of the opinion said:

> "Although as the Court of Appeals correctly noted, there is no express provision in the law either prohibiting or authorizing the lockout, the Act does not make the lockout unlawful per se. Legislative history of the Wagner Act, 49 Stat. 449, indicates that there was no intent to prohibit strikes or lockouts as such. The unqualified use of the term "lockout" in several sections of the Taft Hartley Act is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon. This conclusion is supported by the legislative history of the Act."

This Court also pointed out at page 92, fn. 16, of its decision that Sections 203(c), 206 and 208(a) of the Taft

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[10] See the following reports, 80th Cong., 1st Sess.: HR. Conf. Rep. No. 510, p. 35; HR. Rep. No. 245, pp. 21 and 22; HR. Minority Rep. No. 245, pp. 70, 82; S. Rep. No. 105, p. 24; S. Rep. No. 105, pt. 2, p. 21; also see 93 Cong. Record 1893, 1894.

[11] See the remarks of Senator Taft, one of the sponsors of the amended Act, to the effect that "the basic theory of the entire bill, that is, an attempt to create equality between the employer and the employee," Vol. 2, p. 1206, *Legislative History of Taft Hartley Act of 1947.*

Hartley Act evidence the intent of the Congress to recognize the legality of lockouts under the Act.

That there are areas in which lockouts can be and are lawfully used under both the Wagner and the Taft Hartley Acts is thus clear. However, the limits of the area in which a lockout can be lawfully used have not been heretofore fully determined by this Court. In the *Truckers* case, *supra*, the multi-employer lockout there involved was held to be lawful. The Court in that decision also pointed out that "there are circumstances in which employers may lawfully resort to the lockout as an economic weapon." *Truckers* case, supra, at pp. 92, 93. But the Court did not feel called upon "to define the limits of the legitimate use of the lockout" or "to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike" (p. 93, fn. 19).

Quite significantly this Court, in that decision stated (p. 96):

> "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide."

Without question both single and joint employers are entitled to use self-help. If the continuance of a joint bargaining arrangement has been considered of sufficient importance to justify a multi-employer lockout, it should be recognized that it is equally important for a single employer to be able to utilize "self-help" to hold his customers and to protect the financial integrity of his business.

In the present case bona fide negotiations took place between petitioner and the Unions. There is no intima-

tion that the lockout was designed to frustrate Union organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain.[12] If the lockout is not thus unlawfully motivated, then, as demonstrated by the *Truck Drivers* case, supra, and as otherwise recognized by this Court in that case, it is not illegal just because it interferes with the timing[13] or efficacy of a strike or other lawful concerted activity of employees. See *NLRB* v. *Great Falls Employees Council*, 277 F. 2d 772, 776, note 7.

NLRB v. *Mackay Radio & Tel. Co., supra*, 304 U.S. 333 demonstrates the validity of this position. In that case the right to replace economic strikers was sustained. Such replacement certainly interferes with the exercise of concerted activities by employees. In fact, it is hard to visualize more direct interference or a more coercive act that can be directed against economic strikers to influence them to yield to the employer's terms. In the instant case there was only a temporary layoff of employees on August 11, 1961. In contrast, in the *Mackay* case the employer permanently replaced economic strikers. Thus,

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[12] Cases cited fn. 18, p. 93, *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87; also see *NLRB* v. *Cape County Milling*, 140 F. 2d 543, 545; *NLRB* v. *Anchorage Businessman's Association*, 289 F. 2d 619; *American Vitrified Products Co.*, 127 NLRB 701 (lockout to force union to remove two non-employees from its bargaining committee); *Ralph's Wonder Inc.*, 127 NLRB 1280 (lockout in retaliation for attendance by employees at Union meeting); *Madison Glass Specialty Co.*, 135 NLRB 901 (lockout to compel employees to join different Union at plant to which work was transferred in face of 60 day Union security clause at such plant without giving employees right not to join new Union for such 60-day period).

[13] The Board erroneously contends that a lockout during contract negotiations interferes with full enjoyment of the right to strike by depriving a union of the opportunity to "time" the shutdown. The right to strike does not carry with it as an attribute any protected right to "time" the calling of a strike so that it will succeed. The Taft-Hartley Act does not say that a labor organization has a right to strike before an employer can exercise his right to shut down. There is no guarantee in the Act that a strike, if called, will be successful.

in *Mackay* there was not merely a lockout but actually a termination of employment for the strikers. Yet the *Mackay* case shows plainly that this interference was not unlawful, was not in and of itself an unfair labor practice and that an employer can protect his business by replacing economic strikers.

Other cases support the principle that not every kind of concerted activity of a union is protected in the sense that by interfering with the effectiveness of such activity, an employer commits an unfair labor practice. In *NLRB* v. *Draper Corp.*, 145 F. 2d 199, 202 (CA 4) (1944) employees, who engaged in a wildcat strike, that is, a strike by a minority group, were discharged. They were attempting to compel their employer to deal with them contrary to the rights of the collective bargaining agent chosen by the majority. The Court though recognizing the legality of a minority group strike, held that where they struck to force the employer to bargain with them, they did so at their peril insofar as reinstatement was concerned and nothing in the Act protected them from discharge. Also see: *NLRB* v. *Indiana Desk*, 149 F. 2d 987, 992-993 (CA. 7) (1945).

Obviously an employer who refuses to make concessions to a union at the bargaining table, is interfering with lawful concerted activities but is exercising his lawful right under the Act. Such refusal by an employer may ultimately weaken the union so as to make it yield to his terms. He is thus "interfering" with it, but no one would argue that he has thus committed an unfair labor practice.

II

PETITIONER MAY LEGALLY EXERT ECONOMIC PRESSURE BY A LOCKOUT IN ORDER TO SECURE A COLLECTIVE BARGAINING AGREEMENT.

It has been pointed out above that a lockout is not illegal per se, that the Taft-Hartley Act recognizes its legality and that it has a long history of lawful use. Furthermore, a lockout may be legal even though it interferes with strikes or other concerted employee activities. Indeed, a lockout is the corollary of the strike since it constitutes the employer's means of exerting economic pressure on the unions. And, we submit, it cannot seriously be questioned that this is true irrespective of whether a lockout is used in an individual or multi-employee bargaining unit situation. We believe that four Circuit Courts of Appeals support this view.

In *Morand Bros. Beverage Co.* v. *NLRB,* 190 F. 2d 576, after remand, 204 F. 2d 529, cert. denied, 346 U.S. 909, the Court of Appeals for the Seventh Circuit said the temporary lockout,

> "*. . . should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the Union, a corollary of the Union's right to strike.*" (Emphasis supplied) (190 F. 2d at p. 582).

In *Leonard et al.* v. *NLRB,* 197 F. 2d 435, after remand, 205 F. 2d 355, the Court of Appeals for the Ninth Circuit seemingly agreed with the views of the Seventh Circuit that a lockout is the corollary of the strike. It held that employers can resort to the lockout when faced with "whipsaw" strike tactics in a multi-employer bargaining unit. In *NLRB* v. *Continental Baking Co.,* 221 F. 2d 427,

the Court of Appeals for the Eighth Circuit made a similar ruling.

The *Dalton Brick and Tile Corp.* case, 301 F. 2d 886, (1962) was a single employer lockout in a bargaining context. Although the Court of Appeals for the Fifth Circuit did not expressly hold that a lockout was a corollary of a strike. it strongly indicated that it agreed with the Seventh Circuit in *Morand Bros.* and the Ninth Circuit in *Leonard et al.*

In the *Dalton* case, the Trial Examiner, whose findings were upheld by the Board, found the lockout illegal because it was for the primary purpose of enhancing the employer's bargaining position and the ultimate acceptance of its contract demands. The Court refused to enforce the Board's Order, rejecting the view that a single employer lockout to obtain a bargaining advantage would be presumptively illegal.[14] It said that its approach would be:

> ". . . to match the employer's conduct under review against specific provisions of the Act to see whether, within the accepted limits of judicial revew, there is substantial evidence of actions which constitute violations of standards prescribed by Congress". (301 F. 2d at p. 894)

Under the doctrine of the *Dalton* case, the lockout of petitioner on August 11, 1961 would be permissible, since there is no evidence of record, and the Board does not

[14] That a lockout is presumptively illegal in a single employer situation was in effect the holding of the Board in the instant case where the petitioner was faced with: (1) loss of its customers if the Unions' strike threats materialized, (2) a vote of Union locals authorizing a strike, (3) a history of five strikes on each of five occasions when a new contract was being negotiated, (4) a refusal by the Unions of an offer by the employer to renew the old contract for one year (R. 177), (5) a Union refusal to vote on the last offer of the employer, and (6) a complete impasse in the bargaining negotiations.

even contend, that it was used for any purpose such as to obstruct union organization or to subvert the effectiveness of a collective bargaining representative. This position also finds support in two earlier decisions of the Board in *Lengel-Fencil Co.* 8 *NLRB* 988 (1938) and *Clayton & Lambert Manufacturing Co.* 34 NLRB 502 (1941).[15]

The decision of the Board here should be recognized for what it is and struck down as another attempt to do by administrative fiat what the Congress did not do, namely, to abolish the right to lockout if used in a way to counter pressure from a union. Without question Section 8(d)(4) as well as Sections 203(c), 206 and 208(a) equate "lockouts" with "strikes" under the Act and recognize the legality of both as a means of exerting economic pressure. The Board's position would require an employer to maintain a position of maximum vulnerability to strike action. It would discriminatorily deny to single and largely small employers their right to "self-help" when the legitimate interests of employers and employees collide in the collective bargaining process—a right already enjoyed by multi-employer bargaining groups. *Truck Drivers Local Union No. 449,* supra at p. 96.

The Board here has failed to give proper consideration to the design of the statute to allow either side to exert its

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[15] The decisions of the Court of Appeals for the Tenth Circuit in *Utah Plumbing and Heating Contractors Association* v. *NLRB,* 294 F. 2d 165 and of the Court of Appeals for the Third Circuit in *Quaker State Oil Refining Corp.* v. *NLRB,* 270 F. 2d 40, cert. denied 361 U.S. 917, held the lockouts there involved to be illegal but both are clearly distinguishable from the instant case. In the *Utah* case there was a threat of a lockout during negotiations unless the Unions brought about acceptance of the employer's last offer. No impasse was reached in the bargaining and no critical operational problem or hazard of economic loss confronted the employer. In *Quaker State* there were written assurances of no strike by the Union; the shutdown took place while bargaining was going on; the Union agreed to submit the last proposal of the Company to a vote of the membership. None of these facts were present in the case here under consideration.

full economic power in its bargaining relationship with the other. As this Court said in *NLRB* v. *Insurance Agents' International Union AFL-CIO*, 361 U.S. 477, 489-90: "The presence of economic weapons in reserve and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." Petitioner here simply resorted to an economic lockout as part of its bargaining strategy—a clearly permissible and legal self-help action on its part.

The interests of the petitioner and the Unions have collided in this case. The Company was faced with demands for wages far in excess of those paid by its competitors. It would have been foolhardy to allow the Unions to postpone the bargaining crisis until the busy season of petitioner began. Without question this would have forced its capitulation. The Company and its customers could not afford even a short strike during its busy season. Even the Board has recognized that an employer does not have to wait for a strike to begin before it can take protective action. *Betts Cadillac Oldsmobile Inc.* 96 NLRB 268.

What the Board has actually done in this case is exactly what it was warned not to do by this Court in *NLRB* v. *Insurance Agents' International Union, AFL-CIO, supra.* Although the question at issue there was concerned with whether good faith bargaining under Section 8(a)(5) of the Act had taken place, the Court made clear from its decision that the Board could not act as an arbiter of the sort of economic weapons which the parties could use in collective bargaining. In ruling that the use of the lockout by petitioner was illegal the Board moved out of its area of delegated powers and into an area that deprives petitioner of the very "self-help" to which the Court in the *Truck Drivers* case, supra, said

an employer was entitled to resort in the collective bargaining process.

In the *Insurance Agents' International* case, supra, this Court said that when the Board moved into the area of economic sanctions available to the parties with only Section 8(b)(3) for support:

> "... *it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.* It has sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable, and unjustifiable, proper and 'abusive' economic weapons into the collective bargaining duty imposed by the Act. The Board's assertions of power under Section 8(b)(3) allows it to sit in judgment upon every economic weapon the parties to a labor contract negotiation employ, judging it on the very general standard of that section, not drafted with reference to specific forms of economic pressure. We have expressed our belief *that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.*" (361 U.S. 497-98) (Emphasis supplied).

Although the quoted statements of the Court refer to section 8(b)(3) of the Act, they would have equal applicability to sections 8(a)(1) and 8(a)(3) which are involved here. The Board's view that a lockout used to advance the bargaining position of the employer would be illegal, conflicts with the interpretation of the Act by this Court in the *Insurance Agents* case, supra. When the Board, as it has in this case, invades an area where it decides the economic weapons which the parties can use in seeking

to gain acceptance of their bargaining demands, it has exceeded its powers. Whether this be done under the guise of "balancing conflicting legitimate interests" of the parties or under some other formula cannot and does not legalize the decision.

The Board's position on bargaining lockouts is not based on sound reasoning. It has attempted to design a startling rule of employer conduct—one that was not foreseen by the members of Congress who passed either the Wagner or Taft Hartley Acts—one that is inconsistent, at least with the principles of its multi-employer decisions—one that is not supported by any general weight of opinion among legal authors or experts in the field of labor law,[16] —and one that should be reversed because it is not in accord with the Taft-Hartley Act.

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[16] *Legality of the Lockout*, Koretz, 4 Syracuse Law Rev. 251 (1953); *Lockout Revisited*, Koretz, 7 Syracuse Law Rev. 263 (1956); *Single Employer and Multi-Employer Lockouts Under the Taft Hartley Act*, Meltzer, 24 U. of Chicago L.R. 70 (1956); *Lockouts Under the LMRA, New Shadows on an Old Terrain*, Meltzer, 28 U. of Chicago L.R. 614 (1961); *The Right to Lockout*, Littler, ABA Section on Labor Relations 4 (1952); *Is the Lockout the Corollary of the Right to Strike*, Denbo, 14 Labor Law Journal, 400 (1963); *Permissibility of Lockouts, Shutdowns and Plant Removals*, 50 Columbia Law Rev. 1123 (1950); *Lockout*, Sweetall and Aiges, 9 Labor Law Journal 43 (1958); *Lockouts: Licit and Illicit*, Meltzer, 16th Annual Conf. on Labor, NYU 19 (1963); *Government and Labor*, Northrup and Bloom, 205-210 (1963); *Public Regulation of Collective Bargaining*, Dunlop, ABA Section on Labor Relations 47 (1953); *Policy Making of the New "Quasi-Judicial" NLRB*, Rattner, 23 U. of Chicago L. Rev. 12, 17 (1955); 11 Vanderbilt Law Rev. 246, 248 (Note 11) (1957); *Government Regulation of Industrial Relations*, George W. Taylor, pp. 13-15, 53 (1948); *Extension of Employer Right to Lockout*, 50 Northwestern Law Review 240 (1955).

CONCLUSION

For the foregoing reasons, petitioner urges that the decision of the Court of Appeals is in error and should be reversed and the Order of the National Labor Relations Board should not be enforced.

Respectfully submitted,

CHARLES CAVANO,
605 National City Bank
Building, Cleveland 14, Ohio.
WILLIAM S. TYSON,
821 15th Street, N.W.,
Washington, D. C., 20005,
Attorneys for Petitioner,
The American Ship Building
Company.

November 25, 1964.

APPENDIX

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151 et seq.) are as follows:

Sec. 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * * * *

Sec. 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obliga-

tion of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * * * * * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: (61 Stat. 140; 5 U.S.C. 158(a)(1), (3), (d)(4)).

* * * * * * *

Sec. 203.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any

duty or obligation imposed by this Act. (61 Stat. 153; 5 U.S.C. 173(c)).

• • • • • • •

Sec. 206.

Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public. (61 Stat. 155; 5 U.S.C. 176).

• • • • • • •

Sec. 208(a).

Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate. (61 Stat. 155; 5 U.S.C. 178(a)).

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NO. 255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR LOCAL 374, BOILERMAKERS, AMICUS CURIAE

BERNARD M. MAMET,
Suite 1326,
327 South La Salle Street
Chicago, Illinois 60604
Attorney for Said Amicus Curiae

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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STATEMENT

This Brief is submitted in behalf of Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, with the written consent of both parties herein, copies of which consents have been heretofore transmitted to the Clerk of the Court. Local 374 requests that the Court affirm the Court of Appeals' enforcement of the Board's order. The said Local Union was the charging party before the National Labor Relations Board and a party before the Court of Appeals wherein in a petition for review, consolidated with the Board's petition for enforcement, it sought to enlarge the scope of the Board's order—an issue not involved herein.

SUMMARY OF ARGUMENT

Petitioner here was found guilty of violating Section 8 (a) (1) and (3) of the Act because it discriminated against its employees in regard to the tenure of their employment and because it otherwise interfered with rights guaranteed the employees in Section 7 of the Act. True, the employer laid off (locked out) its employees in order to wrest bargaining concessions from the employees' union, but the action taken by the employer was not against the union. It was against the employees. Moreover, the employer was not found guilty of violating its obligation toward the union in refusing to bargain in good faith. The Board found no Section 8 (a) (5) violation. Yet, the question Petitioner seeks to have reviewed is whether the provisions of Section 8 (d) of the Act equate the employees' right to strike with an employer's right to lay off or lock out. In the Argument we demonstrate that Section 8 (d) merely sets forth and is confined to enumerating standards of conduct between employers and unions for the purpose of determining minimal compliance with Section 8 (5) of the Act. We note that Section 8 (d) and Section 8 (5) are separate and distinct from Section 8 (a) (1) and 8 (a) (3) and that even assuming, *in arguendo*, the use of the word "lockout" in Section 8 (d) immunizes an employer from a claimed violation of Section 8 (a) (5) of the Act, an employer may still be guilty of an 8 (a) (1) and 8 (a) (3) violation when it locks out its employees. In the Argument we discuss the nature of the varying rights and the relationships under the Act—the employer-union relationship and the employer-employee relationship and we point out that each is different: While employees are represented by unions, employees are not unions and the impact of permitting a lockout during collective bargaining results actually in penal-

izing an employee because he has joined a union. We suggest that the positive protections granted an employee *vis-a-vis* his employer are substantially different from those granted the employer and the union *vis-a-vis* each other. And, to the extent that Section 8 (d) treats only the employer-union relationship, it is clearly inapplicable to violations revolving around discrimination and interference with employees' rights. Moreover, it would appear anomalous to us to find that employees' rights against discriminatory layoffs before they become represented by a union are fully protected but when that representation is translated into an actuality *via* the collective bargaining process itself, the employees' protection against a discriminatory layoff is either vitiated or substantially reduced.

In our first line of inquiry we attempt to demonstrate that Section 8 (d) does not prohibit the Board from protecting employees' rights and finding the employer guilty of 8 (a) (1) or (3) violations. As regards the balance struck here by the Board we suggest that there has been no inconsistency or abuse of discretion. In fact, if consistency is necessary, the Board has treated the multi-employer situation the same as the single employer situation. In each instance there must be an affirmative act by either the employee himself or by the bargaining representative of the employee imputable to the employee. Obviously, in the multi-employer situation, a strike has occurred in a portion of the bargaining unit and under the Board's view the employer is immunized against any claim of illegality in locking out the employees in the balance of the bargaining unit. In the single employer situation, the Board requires a finding of the threat of a strike before it will determine whether the employer's action is "offensive" or "defensive". Using an "offensive" or "defensive" test, the Board, through ascertaining objective facts, translates these words into an operational definition which can be reasonably measured. First and fore-

most, in each situation, there must either be strike imminency or a strike itself—and consistently (at least since 1954) the Board has applied these yardsticks.

While the balance struck by the Board is not arbitrary, we would go beqond the Board's view. We believe the position taken by the Board prior to 1954 is more compatible with the terms of the Act. Our view of the discriminatory layoff or lockout situation is that the employee is specifically protected against such action under Section 8 (a) (3) of the Act and that the employer has no corresponding or counter right under any provision of the Act: there is nothing to balance. While in certain situations the employees' rights may not be absolute, we nevertheless suggest that before a balance can be struck, one must find at least some employer right in the existing Act and we find none. Admittedly, under this Court's decision in *NLRB* v. *Truck Drivers Local* 449, 353 U. S. 87 (1957) our contention is not in accord with existing law. From the standpoint of the practitioner, one can only hope that the Board can be convinced in the future to revert to its pre 1954 views. Irrespective of what reappraisal may be made by the Board, we suggest that the Board, within the area of policy allowed to it, has not abused its discretion. We note the seriousness of lockouts and the potential effects upon employees and the collective bargaining process in general. We point out that in the final analysis the employer still has the right to unilaterally change working conditions and place its last offer into effect once an impasse has been reached and that as long as the Board continues to arrive at a balance by examining whether or not a strike has occurred in multi-employer units or the threat of a strike in single employer units, the employer cannot legitimately complain: it has been granted greater rights in terms of infringing upon employees' rights than we believe was contemplated under Sections 7, 8 (a) (1) and (3) of the Act.

ARGUMENT

The question presented for review is whether, under Section 8 (d) (4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' right to strike. Significantly, Section 8(d) (of which sub-paragraph 4 is a part) treats only one subject—it statutorily sets forth some of the requirements of good faith bargaining as regards the employer [Section 8 (a) (5)] and the union [Section 8 (b) (3)]. Where there is a collective bargaining agreement in effect, Section 8 (d) provides that the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify it unless the party desiring modification or termination serves a written notice, offers to meet and confer, notifies the Federal Mediation and Conciliation Service and, under sub-paragraph 4, "continues in full force and effect, without resorting to strike or *lockout*, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration of such contract, whichever occurs later" (Italics supplied). Thus, the minimal requirements for compliance with the good faith bargaining provisions of the Act (imposed under the 1947 amendment on unions as well as employers) are set forth in Section 8 (d). Respondent would argue that because Section 8 (d) expressly utilizes the word "lockout", the employer's right to lockout must necessarily be equated (or is a necessary corollary of) the employees' right to strike for all purposes.

By utilizing Section 8 (d) (4), Petitioner seeks to advance an equation of rights as between employers and employees. Yet, 8 (d) (4) deals not with the relationship between an

employer and his employees, but rather treats requirements of good faith bargaining between employers and unions, and while unions are representative of employees, unions are not employees. The Act deals not with two parties alone (the employer and the union) but it affords protection and imposes restrictions upon at least one additional party —the employee. And these three identifiable subjects are not geometrically molded into an isosceles triangle under the Act. Congress did not determine that the duties imposed upon one should necessarily, and for all purposes, be imposed upon another. True, the 1947 amendment to the Act, under Section 8 (b) (3), imposed a duty upon labor organizations to bargain in good faith and to come to the bargaining table with the same attitude of willingness to reach an agreement as the Wagner Act had required of employers. But this duty, defined further under Section 8 (d), was not designed to and did not take away any rights of employees existing elsewhere in the Act. Standards of conduct generating from a mutual duty of employers and unions to negotiate in good faith were never intended to limit the employees' rights under Section 7, Section 8 (a) (1) or Section 8 (a) (3) of the Act. Even if it could be argued that the use of the word "lockout" in Section 8 (d) might imply that the lockout alone would not violate the good faith bargaining provisions of the Act [Section 8 (a) (5)] does it follow that a lockout is *per se* legal for the purposes of Section 8 (a) (3) and 8 (a) (1)? Because the lockout might not be a factor to consider in evaluating the conformance with standards of conduct required in good faith bargaining, must it also be excluded in determining whether or not the employer has discriminated against employees in regard to hire or tenure of employment [Section 8 (a) (3)] or whether it has interfered with, restrained or coerced employees in the exercise of the rights guaranteed in Section 7

of the Act [Section 8 (a) (1)]? We suggest that the positive protections granted an employee *vis-a-vis* his employer are substantially different from those granted the employer and the union *vis-a-vis* each other. A union may not violate the provisions of Section 8 (b) (3) by engaging in harassing tactics during negotiations, but the participating employees may not be protected in their concerted activities under Section 7. *NLRB* v. *Insurance Agents' International Union*, 361 U. S. 77 (1959).[1] Under Section 8 (d) of the Act, a union which fails to comply with each of the enumerated steps is guilty of an 8 (b) (3) violation. Yet, the Act [Section 8 (d)] only imposes a duty on the employee not to strike within the sixty day notice period and provides that if he does he loses his status as an "employee" and then only under certain sections of the Act. While obviously, relationships exist between many sections of the Act, virtually each section is separate: the fact that certain activity does not violate one section of the Act does not mean that the same activity may not violate another section of the Act no more than the violation of one section results in automatic violations of other sections. *Cf., NLRB* v. *Drivers Local 639*, 362 U. S. 274 (1960).[2] True, balances are struck under the Act, but these balances are neither necessarily static not symmetrical. Whether concepts of tit

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1. Significantly, *Insurance Agents* dealt only with the union's duty to bargain and whether or not the use of harassing tactics by a union during bargaining was a *per se* failure to bargain in good faith in violation of Section 8 (b)(3). There, the relationship between employer and union was directly brought into play but in no way did it involve Section 8 (1) and (3) rights of employees.

2. Noteworthy is the fact that although the conduct of the union there did not constitute an 8 (b)(1)(A) violation, it did constitute an 8 (b)(7) violation under the amended Act. See Memorandum of Justice Stewart, 362 U. S. at 292. So, too, conduct not violative of Section 8 (d)(4) may nevertheless violate Sections 8 (a)(3) and (1).

for tat or *quid pro quo* apply may be germane in a legislative forum, but as regards existing legislation, each right, duty, privilege or proscription must be viewed not only from the standpoint of the moving party and the recipient of the action but additionally from the section of the Act claimed to have been violated. A change in mixture may change the result. What one class may do, other classes may be prohibited from doing. What may be privileged as against one class may be proscribed as against another. And, what may not violate one section of the Act may be a violation of another.

In passing, it is to be noted that we have not concerned ourselves with whether the use of the word "lockout" in Section 8 (d) may or may not immunize an employer from a claimed 8 (a) (5) violation. We only say that it has no bearing upon Sections 8 (a) (1) and (3)—or even upon this case. Notably, no 8 (a) (5) violation was found here. The Board did not find the employer guilty of not bargaining in good faith but rather it found that by laying off its employees (here called lockout because it involved all of the non-supervisory employees at one location) it discriminated against these employees in regard to the hire or tenure of their employment in violation of Section 8 (a) (3) of the Act and derivatively it interfered with the Section 7 rights in violation of Section 8 (a) (1) of the Act. Whether or not the employer also violated an obligation imposed upon it as regards bargaining and whether or not the Act grants employers and unions identical and equal rights under Section 8 (d) is not involved here.

Petitioner's argument is not limited to a statutory exclusion theory (*i. e.*, the use of the word "lockout" in Section 8 (d) prohibits the Board from finding that a lockout violates any provision of the Act). Petitioner also argues

that the Board's position has been "inconsistent and vacillating" (Brief, pg. 9). The action of the Board has been arbitrary, it claims, because the Board's "position on individual employer lockouts is in stark contrast with its position on the legality of lockouts where multi-employer bargaining is involved." (Brief, pg. 11) It concludes that because of an alleged disparity of approach in the multi-employer and single employer situations, the Board should be reversed. At this stage of its argument, Petitioner apparently then does not question the right of the Board to balance conflicting interests. Rather it seems to contend that the Board has abused its discretion. To begin with, what Petitioner claims to be inconsistent and vacillating may be nothing more than the empiric process of balancing conflicting interests through the exercise of non-static judgment, based upon particular facts at a particular time. More important, if consistency is a *sina qua non* to the appropriate exercise of discretion (and we do not know that it is) the Board has indeed fulfilled that requirement as regards multi-employer and single employer lockouts. In both situations it requires a strike threat or the fulfillment of that threat—the strike itself. What Petitioner overlooks is that in *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U. S. 87 (1957) there was a strike in the multi-employer bargaining unit. The Board, with this Court's approval, held that where a strike occurs in one portion of a bargaining unit a "lockout to preserve the multi-employer bargaining basis from disintegration threatened by the union's strike action was lawful." *Id* at 97. Similarly, in the single employer situation the threat of an immediate strike represents the critical factor. In these types of situations the Board utilizes the words "offensive" and "defensive". Each case is decided on its own facts. In striking a balance the Board has not relied upon subjective contentions, but rather upon objective criteria measurable by the facts in the par-

ticular case and not by self-serving opinions of either side verbally expressed from a witness stand. Hence, some lockouts have been found not to violate the Act and others have been found to be illegal. If the lockout was "offensive" in nature, *i. e.*, designed to wrest bargaining concessions from the employees by utilizing the economic power of withholding work and pay to starve them into submission, then there was illegal interference and the Act was violated. On the other hand, if the action of the employer was truly "defensive" in nature and designed to protect the integrity of the employer's business, then the lockout might be justified. In each instance, words such as "offensive" or "defensive" have been translated operationally by the Board. First and foremost was the consideration of whether or not the actual threat of a strike existed. If it did, then perhaps the action of the employer was defensive in nature. If no strike threat existed, and if, in addition, there were assurances against a strike then the objective facts clearly demonstrated an aggressive offensive move on the part of the employer designed to illegally interfere with the rights of employees guaranteed in Section 7 and 8 of the Act.

Clearly, the balance struck by the Board is not arbitrary. Actually, our analysis of the varying rights under the statute would lead us to the conclusion that lockouts are *per se* violative of Sections 8 (a) (1) and (3) of the Act. We see no clash between the employee's right to be protected against discrimination in regard to hire or tenure of employment under Section 8 (a) (3) and any offsetting statutory right of an employer. We believe that a lockout is inherently discriminatory and destructive and that no business purpose, however legitimate, represents a defense to a lockout. It appears anomalous to us to find employees' rights against discriminatory layoffs fully protected when the employee

seeks to be represented by a union but when that representation becomes an actuality in the collective bargaining process itself, the employees' protection against the same discriminatory layoff is vitiated—or at least substantially reduced. We are, not unmindful of *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938)[3] and, of course, directly in point, *NLRB* v. *Truck Drivers Local Union 449*, 353 U. S. 87 (1957).[4] Significantly, in each of these cases, affirmative action was taken by the employee himself or at least could be imputed to the employee by the action his collective bargaining agent had taken. In the *Mackay* case the employee struck. In the *Truck Drivers, Local Union 449* case a strike occurred in a portion of the bargaining unit of which the employee was a part and while the employee discriminated against may not have participated in any decision to take any action, it perhaps could be said that he was bound by the decision of his bargaining agent. Even here, we would disagree that 8 (a) (1) and (3) rights of *employees* could be altered by becoming a member of a union or by the employee or a fellow bargaining unit member

3. It is to be noted that the Board, with this Court's approval, refused to extend the *Mackay* doctrine by granting super seniority to strike replacements, with this Court noting that "We have no intention of questioning the continuing vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here." *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 232 (1963).

4. *NLRB* v. *John Brown, et al.*, No. 7, pending this term before this Court, presents complications which flow from the Board's striking a balance which would permit employers in a multi-employer bargaining unit to lock out their employees following a strike of one of the employers. Evaluating what it calls competing interests, the Board in *Brown* properly is unwilling to extend the multi-employer lockout concept to a point where locked out employees, ready and willing to work, may be temporarily replaced. Within its special function, the Board has struck a balance which it believes appropriate. Perhaps in future years, as various problems develop, it may desire to reexamine the balance it struck in the *Truck Drivers Local Union No. 449*.

striking or the employee's union threatening to strike. This, however, is the existing law and the practical quarrel stops there; except perhaps for practitioners to attempt to convince the Board to revert to its pre 1954 views. *Morand Bros. Beverage Co.*, 99 NLRB 1448, 1461-1466; *Davis Furniture Co.*, 100 NLRB 1016; *Continental Baking Co.*, 100 NLRB 143. But irrespective of what reappraisal is made in the future, to permit further encroachment upon rights guaranteed employees under Sections 8 (a) (1) and (3) of the Act, we submit, will have devastating consequences. Lockouts are feared for no small reason. In the final analysis, it is the employer who controls the pay check. It is one thing to join a union and even to participate in union activities. It is quite another to be deprived of earnings because of the joining of a union. One need only attend a union meeting at contract time to ascertain that there may well be a right more valuable than the right to strike—the right not to strike. In virtually all unions today, constitutions require that a strike be authorized by at least a majority of the members voting (and as regards the instant union, by two-thirds of the membership). And despite the notoriety given some strikes, it is significant that only thirteen one-hundredths of 1% of estimated working time was lost in the calendar year 1963 due to strikes.[5] Clearly, the employee has not been prone to vote himself on the street. Luxuries have merged into necessities with the resultant expansion of credit extension. The employee's requirements to meet periodic payments indeed militates against the resort by him to economic pressure, except in rare cases. Yet, one employer representative in authority is all that is necessary to decree a lockout. And we submit

5. *See*, 87 Monthly Labor Review 1370 (U. S. Dept. of Labor, Nov., 1964).

that under the Act, the employee has the right not to be exposed to the type of interference generated by a lockout—that he has the right to rely upon the collective bargaining processes without fear of or needless work stoppages.

In its Memorandum in answer to the Petition, the Board stated that the "use of the lockout as an 'offensive weapon' in collective bargaining has not proved a major practical problem in the administration of the Act." (Brief, pg. 11) We believe that if this is so, it has been because of the prevailing concept among those in labor and industry that a lockout may be illegal. We suggest that legalizing its use will set the stage for constant warfare as a substitute for exploration and bargaining table exchanges designed to arrive at a settlement sufficiently palatable to all concerned. True, employees, bowing to the employer's condition of "no contract—no work," may well accept lesser settlements in order to avoid financial deprivation, but pressure and power plays have a way of coming full cycle with the recipients of the pressure waiting for the appropriate time to retaliate. We suggest that the existing collective bargaining processes have proved beneficial to our society. The move toward mature labor relations in recent years has come not from workstoppages but rather from mutual understanding arrived at through the exchange of ideas *via* the bargaining process. In those situations where the employer believes that the bargaining process has been exhausted, he is still permitted to unilaterally change working conditions and to place his last offer into effect once an impasse has been reached. *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 224-225 (1949). And certainly as long as the Board continues to arrive at its balance by examining whether or not a strike occurred in multi-employer units or the threat of a strike in single employer units, the

employer has been granted greater rights in terms of infringing upon employees' rights than we believe was contemplated when the protections for employees were established in Sections 7 and 8 (a) (1) and (3) of the Act.

CONCLUSION

For the foregoing reasons, we join the Board in requesting that the Court of Appeals decision enforcing the Board's order be sustained.

Respectfully submitted,

BERNARD M. MAMET,
Suite 1326,
327 S. La Salle Street,
Chicago, Illinois,
HArrison 7-7630,
Attorney for Local 374, Amicus Curiae.

Chicago, Illinois,
December 23, 1964.

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NO. 326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
THEODORE J. ST. ANTOINE
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D.C. 20005
THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N. W.
Washington, D.C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 255

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

The National Labor Relations Board found that the company, the petitioner here, could not reasonably have feared that the union intended to strike, and that its lockout of its employees was accordingly not legally permissible as a defensive measure to prevent customers' ships from being tied up in the company's shipyard (J.A. 293-296). The Board found, contrariwise, that the company locked out its employees "as an offensive weapon intended to force the abandonment of the union's contract demands and the

acceptance of the employer's" (J.A. 295-296). Hence the Board held, under long settled doctrine, that the lockout violated Section 8(a)(1) and (3) of the Act.

The Board's findings as to the reason for the lockout were sustained by the Court of Appeals, and this Court declined to review that aspect of the case. Under the limited grant of certiorari the question before the Court, as stated in the petition for certiorari, is:

> "Whether, under Section 8(d)(4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' statutory right to strike?"

However, Section 8(d (4) deals only with the 60 day notice requirement, before strike or lockout, where a collective bargaining agreement is in effect. There is no contention that the company violated § 8(d)(4). Its lockout of its employees was held invalid, rather, under § 8(a)(1) and (3).

Presumably the company means to argue, by its phrasing of the question in the petition for certiorari, that § 8(d)(4) implies that the lockout, like the strike, may be legal in some circumstances. Granting that, § 8(b)(4) still does not so much as intimate that the lockout is the corollary of the strike, so that the one is legally permissible wherever the other would be.

However, we take it that the Court wishes to consider in this case the broad issue it noted and reserved in *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, footnote 19):

> "We thus find it unnecessary to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike."

We submit that the employer lockout is not in any sense the corollary of the employees' statutory right to strike. We will discuss the issue from two different standpoints:

(1) whether, from the standpoint of the functioning of the collective bargaining process, the right to lockout is the corollary of the right to strike, and (2) whether, as a legal matter, the right to lockout is the corollary of the right to strike, under the language and over-all plan of the Act.

Petitioner argues the former point (Br. pp. 12-18), but not the latter. Instead petitioner simply contends that the use of the lockout as an offensive weapon in collective bargaining should not be held to violate the Act. We will discuss this contention briefly before examining the relationship between strike and lockout.

I

The Lockout as an Offensive Weapon in Bargaining Violates the Act

It is quite clear that a lockout of the sort involved in this case, *i.e.*, the shutdown of operations by an employer in order to win concessions from the employees in collecting bargaining, does literally violate the Act.[1]

Section 7 provides that employees shall have the right to join unions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities (*i.e.*, to strike). It also provides that they have the right to refrain from such activities. Section 8(a) (1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

It can hardly be doubted that the lockout of employees—their temporary layoff—as a weapon in collective bargaining does interfere with, restrain and coerce employees in

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[1] Webster's Third New International Dictionary defines "lockout" as "the withholding of employment by an employer and the whole or partial closing of his business establishment in order to gain concessions from employees."

the exercise of their right to engage in collective bargaining. An anticipatory lockout likewise interferes with the right of employees to strike, and even more with their right to refrain from striking.

Again, § 8(a)(3) makes it an unfair labor practice for an employer to discourage membership in a union by discrimination in regard to "tenure of employment or any term or condition of employment." A lockout, by laying off employees, discriminates in regard to "tenure of employment"; and it can hardly be doubted that it discourages union membership. Cf. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221.

Petitioner argues that the use of the lockout as a weapon in collective bargaining is no more violative of the Act than the lockout in defense of a multi-employer bargaining unit, sanctioned in *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87; and, further, that the lockout is a weapon of less virulence than the hiring of strikebreakers, sanctioned in *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333.

This is the same line of argument that was rejected by the Court in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221.

The fact that the Board, or this Court, holds that a certain type of conduct was not meant to be banned by the Act, even though literally within its general proscriptions, does not mean that those proscriptions may not embrace other types of conduct. Compare *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665, and *United Steelworkers* v. *NLRB*, 376 U.S 492, with *Electrical Workers Local No. 761* v. *NLRB*, 366 U.S. 667. The question, rather, is whether the Board exceeded its wide range of discretion in "the balancing of conflicting legitimate interests" *(Truck Drivers Local 449*, 353 U.S. at 96) in concluding that the damage done to collective bargaining and industrial peace by use of the lockout as a weapon in collective bargaining outweighs the employer's interest in self-help. To that issue we now turn.

II

The Lockout is Not the Corollary of the Strike as Respects the Functioning of Collective Bargaining

The lockout is not the corollary of the strike, either literally or in substance, from the standpoint of its relation to the collective bargaining process.

1. Viewing the matter literally, the right to lockout is the right to close the plant. However, the right to strike, is not, to our regret, the right to close the plant, since the employer has the legal right to continue to operate in the face of a strike, either with supervisors or with strike-breakers. Literally, the corollary of the right to strike is the right to break a strike; and the employees have no right which is the corollary of the lockout.

2. More important, the strike and the lockout are not comparable as regards their respective relationships to collective bargaining.

The right to strike is indispensible to the employees' collective bargaining power.

> "This repeated solicitude [i.e., of the Congress] for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221, 233-234.[2]

> "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme." *Division 1287, Amalgamated Assn.* v. *Missouri*, 374 U.S. 74, 82.

The right to lockout is not comparably indispensible to

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[2] At this point the Court quoted at length, in a footnote, from the well known opinion of Chief Justice Taft in *American Steel Foundaries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209.

employer bargaining power, for the reason that an employer has other powerful weapons in bargaining, quite apart from the lockout. In the usual situation, where the employees are seeking improvements in wages, hours or working conditions, the employer can simply refuse to make any changes in the status quo.[3] If the employees strike, the employer is free to replace them permanently with new employees who do accept the existing working conditions. *NLRB* v. *Mackay R. & Tel. Co.*, 304 U.S. 333. An employer is even free unilaterally to put into effect proposals he has made to the union, and which have been rejected by the union, once an impasse has been reached in bargaining with the union. *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217. In that situation, too, the employer is free to replace employees who refuse to work on the new terms.

Thus an employer's ability effectively to press his collective bargaining proposals is not dependent upon his having the right to lockout his employees, as the employees' ability to press their proposals is dependent upon their having the right to strike.

Facile assertions that the strike and the lockout are "countervailing weapons" (Petitioner's Br. p. 13) overlook these fundamental differences in the legal rights and economic power of employers and employees. Nor is it true that use of the lockout, like use of the strike, "is well recognized and accepted." *(Id.)* As establishing this assertion petitioner quotes Millis and Montgomery, *Organized Labor* (1945), p. 554. One passage quoted by petitioner, with petitioner's deletions restored and italicized, is as follows:

> "In exerting pressure upon employers to recognize them and to accept their demands, unions, *provided*

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[3] Section 8(d) provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

> *argument is unsuccessful,* resort to the strike, *the boycott, and possibly violence and sabotage.* The employers resort to corresponding methods—the lockout, *the black list, and violence.*"

It is quite evident, once the deletions are restored, that Millis and Montgomery were describing the weapons actually used by unions and employers, but with no inference that they were "well recognized and accepted."

3. The question remains whether a broad right to lockout employees during collective bargaining, as a means of putting pressure on them to accept the employer's terms, should be accorded to employers to achieve "the balancing of conflicting legitimate interests." (*NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96.) In other words, whether employers should be accorded this right in order to give them additional bargaining strength, as the Board put it, "to force the abandonment of the union's contract demands and the acceptance of the employer's."

More precisely, the question is whether the Board's conclusion, that the balancing of interests between employers and employees does not require that employers be permitted to use the lockout as an offensive weapon during collective bargaining, is so unreasonable as to exceed the considerable discretion vested in the Board to make determinations of this sort. *NLRB* v. *Truck Drivers Local 449*, 353 U.S. at 96-97; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236-237.

As has been shown, the use of the lockout here in issue is, as the Board held, a literal violation of § 8(a)(1) and (3) of the Act. In view of *Truck Drivers Local 449*, and of *Mackay*, we presumably must nevertheless concede that the Board could permit the lockout as an offensive weapon in collective bargaining, if it reasonably concluded that employers should be accorded such a right to achieve an

over-all balancing of conflicting interests.[4] However, the Board has not reached that conclusion, but the opposite one.

It is our position that the NLRB, by its interrelated doctrines as to what measures of self-help employers may and may not use, and in what circumstances they may use them, in labor disputes over economic issues, including its ruling against use of the lockout as an offensive weapon in ordinary circumstances, "has legitimately balanced conflicting interests" *(Truck Drivers Local 449,* 353 U.S. at 648), if indeed its doctrines are not overbalanced in favor of employers.

Let us briefly review these doctrines.

To begin with, as stated earlier, an employer has the right to resist a strike by continuing to operate, using supervisors and/or strikebreakers. He is even free to replace strikers permanently with strikebreakers, *NLRB* v. *Mackay R. & Tel. Co.,* 304 U.S. 333, though he may not accord superseniority to the latter. *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221.

The employer's right to self-help against a strike also includes, of course, the right to close a struck plant. On the other hand, the Board has consistently taken the view that ordinarily an employer who has not been struck may not shut down operations, and lock out his employees, during collective bargaining, in order to put pressure on them to accept his terms. To this general doctrine the Board

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[4] But cf. *NLRB* v. *Insurance Agents Int. Union,* 361 U.S. 477. Section 1 of the NLRA declares:

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce • • • by restoring equality of bargaining power between employers and employees."

The Act contains no expression of concern about equalizing employer bargaining power.

has, however, recognized two exceptions; i.e., it has held that in two situations an employer is entitled to shut down his operation in advance of a threatened strike as a defensive measure.

One situation in which a lockout is held to be permissible as a defensive measure is when an unscheduled shutdown would be unusually injurious because of special circumstances. Thus the Board has sanctioned defensive shutdowns where it has found that a threatened strike could result in spoilage of inventory *(Duluth Bottling Assn.,* 48 NLRB 1335), the tieing up of customers' cars (*Betts Cadillac Olds, Inc.,* 96 NLRB 268), and inconvenience and danger to the public from a sudden tie-up of road and bridge construction *(Bldg. Contractors Assn.,* 138 NLRB 1405). As this Court put it in *Truck Drivers Local 449,* 353 U.S. at 97, the Board "has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown."

The Board has also held, and this Court sustained its decision, that all of the members of a multi-employer bargaining unit might shut down when the union struck one member. As this Court put it in that case, *Local 449,* 353 U.S. at 93:

> "The narrow question to be decided is whether a temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis."

The Court's rationale, in upholding the Board, was (p. 96):

> "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bar-

> gaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (Citations omitted.)

An alternative and simpler rationale is that a multi-employer unit should be treated as a single employer, not merely for collective bargaining but for determining the permissible responses to a strike. Under that rationale the employers could shut down the entire multi-employer unit if any part of it were struck, and could replace strikers *(Mackay)*, but could not replace, either temporarily or permanently, employees who do not go on strike. A single employer, part of whose operation is struck, may not replace employees who do not strike, and there is no reason, pragmatic or theoretical, for according any wider right to replace to employers in a multi-employer unit.[5]

In any event, we submit that these interrelated NLRB doctrines as to employer self-help during a strike over economic issues are certainly not unreasonably weighted against employers, if, indeed, they do not unduly favor them.

In view of their much greater financial resources,[6] employers are far better able to wait out a strike than are

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[5] The issue of temporary replacement of employees, in a multi-employer unit, who did not go on strike, is before the Court in *NLRB* v. *Brown*, No. 7, October Term, 1964, set for argument with this case.

[6] According to BLS Report No. 237-38 (April 1964) the average income after taxes for skilled workers is $6,664; for semi-skilled is $5,681; and for unskilled is $4,330. The 1963 Survey of Consumer Finances by the Survey Research Center, University of Michigan (Ann Arbor) shows that the median total liquid asset holdings in early 1963 were $255 for a "spending unit" (*i.e.*, fam-

employees. But employers need not wait out a strike: under the Court's dictum in *Mackay,* which the Board has followed, employers have the legal right to hire strikebreakers. In situations where it is practicable for employers to exercise that right, Board doctrine does not achieve any "balancing of conflicting legitimate interests." The supposed rights of the employees to bargain collectively and to strike are wholly subordinated to the right of the employer to operate his business. As Professor Meltzer, a defender of the lockout, or at least of the right to lockout, has observed:

> "* * * where the right to replace can be and is exercised, its exercise generally poses a more serious threat to industrial peace than does a lockout; the prospect of replacements constitutes, moreover, a more effective restraint on concerted activities than does the lockout." [7]

Petitioner, and Professor Meltzer too, argue in effect, that since strikebreaking, which is a more potent weapon than the lockout and more flagrantly violative of employee rights under the Act, has been sanctioned, so should the lockout be. But it does not follow that poison gas should be legalized because atomic weapons have not been banned.

We submit that the optimum result would be for the Court to reverse its *Mackay* dictum, and ban strikebreaking. If an employer cannot agree on terms and conditions of employment with his own employees, and an impasse is reached in negotiations, an employer should have the

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ily) having income of $5000-$6000; $465 for a unit having income of $6000-$7500; and $880 for a unit having income of $7500-$10,000 (p. 99, table 6-2). During the same period, 60% of the spending units in the $5000-$7500 bracket owed installment debt (*i.e.*, excluding mortgage debt), the median amount of debt being $455; and 63% of the units in the $7500-$10,000 bracket owed installment debt, the median amount being $785. (p. 66).

[7] Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. Chic. L. Rev. 614, 617.

right to put his own proposals into effect, but he should not have the right to replace employees who reject them and go on strike.

Such a rule would more nearly equalize economic strength, though employers would still usually have the advantage. It would obviate strike violence.[8] It would forbid, instead of sanctioning, discrimination against employees for engaging in concerted activities supposedly protected by the Act.

If strikebreaking were banned, then it could be argued, as pointed out earlier, that the lockout was indeed the corollary of the strike. For if strikebreaking were banned the right to strike would be the right to shut the operation down, and that is what the right to lockout is. Even then the questions would remain (1) whether according employers the right to lockout would achieve a reasonable balancing of interests, and (2) whether employers have any legitimate need for the lockout, absent special circumstances, in view of their right to put their proposals into effect if an impasse is reached. However, if strikebreaking were banned the strike and the lockout would then at least have the same legal and practical effect, i.e., to shut down the plant. At present the right to strike is only the right to stop work, at risk of replacement, not the right to stop the operation; and the lockout is in no sense a corollary right.

If, however, the Court feels that it is too late to overturn *Mackay* now, after the Taft-Hartley and Landrum-Griffin revisions of the NLRA, the approach the Court used

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[8] Petitioner states (Br. p. 11, fn. 3), "Actually, replacement of strikers and attempts to operate a plant with strikebreakers may well lead to violence * * *" Millis and Montgomery (p. 669) are in accord.

in *Erie Resistor* becomes applicable here, *viz.*, (373 U.S. at 232):

> "We have no intention of questioning the continuing vitality of the Mackay rule, but we are not prepared to extend it to the situation we have here."

We have shown, we submit, that the Board's present rules on self-help are tilted in favor of employers. But we need not show that. This Court has repeatedly and recently held that the Board has wide discretion in striking a reasonable balance, and certainly no case can be made that its rules are inordinately adverse to employers.

It would of course increase the strength of employers relative to unions in collective bargaining to accord to employers the right to use the lockout as an offensive weapon in bargaining. That, frankly, is one reason we are opposed to it. The other reason is that it would greatly increase the number of shutdowns and the amount of industrial strife.

The right to use the lockout as an offensive weapon in bargaining would strengthen employers and weaken unions in two ways. In the first place it would give employers a greater measure of control over the timing of a shutdown. Control of timing is of course of major importance in an economic test of strength. An employer always has the right to shut down for economic reasons,[9] but if an employer can also use a shut down during slack season as a weapon to induce acceptance of his contract proposals his bargaining strength is greatly augmented. Conversely, a strike during an employer's busy season is a more powerful weapon than a strike during the slack season; and employees may be especially reluctant to strike at certain times of year, such as the Christmas season. The proce-

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[9] However, an increasing number of collective bargaining agreements provide for payment of supplemental unemployment benefits by employers.

dural requirements of § 8(d) would of course have to be met by employers resorting to lockout, as by unions resorting to strike, but, depending on contract reopening provisions and expiration dates, great flexibility as to the timing would remain.

Just how much flexibility would depend on whether the rule adopted allowed the employer to use the lockout as an offensive weapon in bargaining only after an impasse was reached—the situation here—or allowed use of the lockout at any time so long as the procedural requirements of § 8(d) had been met. Since the union is free to strike at any time, once it has complied with § 8(d), and need not await impasse,[10] it might follow, if the lockout were held to be the corollary of the strike, that the employer was similarly free as respects the timing of the lockout. That would give employers a powerful weapon indeed.

To meet this threat of a lockout timed to the employer's interests and convenience, unions would often be compelled to strike prematurely, at a time when the strike would have maximum impact on the employer or minimum detriment to the employees, without waiting to see whether agreement could be reached without a strike. Since agreements are reached without a shutdown in more than 98% of contract renegotiations,[11] such a development would be most unfortunate.

The other reason why legalizing the lockout would cause more shutdowns is that employers would sometimes likewise resort to lockout in situations where agreement could have been reached without a shutdown. There is, of course, a large element of bluff in collective bargaining negotiations, and unions often threaten to strike, take strike votes,

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[10] *NLRB* v. *Insurance Agents' Int. Union*, 361 U.S. 477, 491.
[11] U.S. Dept. of Labor, Analysis of Work Stoppages 1963, Bulletin No. 1420, Oct. 1963, p. 2.

etc., without actually expecting to strike. Thus if employers were free to lockout, they would, in order to get the advantage of timing, inevitably shut down in many situations where no strike would have eventuated.

When there is added the likelihood, discussed above, that if employers were free to lockout unions would be quicker to strike in order to retain control of the timing of the shutdown, the over-all results of sanctioning the lockout would be a greatly increased number of shutdowns and sharply augmented industrial strife.

III

The Lockout is not the Corollary of the Strike as Respects the Language or Over-all Plan of the Act

From the standpoint of their respective legality or illegality, the strike and the lockout have never been corollary.

At common law the lockout occupied a preferred legal position to the strike. Petitioner states (Br. p. 13):

> "Prior to the Wagner Act the lockout was practiced without legal restriction by single employers or voluntary associations of interested employers."

This assertion, which is correct, is evidently taken from Millis and Montgomery (p. 555):

> "At common law the lockout may be practiced without legal restriction, whether by a single employer or by a voluntary association of employers directly interested."

Millis and Montgomery go on to point out that (p. 556) "the courts in applying the common law have placed limitations upon strikes not placed upon lockouts." Those limitations are detailed at length, pp. 556-566.

The Wagner Act (1935-1947) reversed the situation, for under it the strike occupied a preferred legal position to the lockout. In the Wagner Act "Congress safeguarded

the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *International Union, Etc.* v. *O'Brien*, 339 U.S. 454, 457.[12] While some strike activities were beyond the protections of the Act,[13] none were forbidden by it, since the Act dealt only with employer, and not union, unfair labor practices. In contrast, while the Wagner Act contained no specific references to the lockout, the general provisions of §§ 7 and 8, which were carried over into Taft-Hartley, unquestionably rendered the lockout illegal in some circumstances, *i.e.* when used to undermine the union, or to evade the duty to bargain. See *Truck Drivers Local 449*, 353 U.S. at 93.

The Board doctrine, also referred to with apparent approval in *Local 449* (p. 97), permitting lockouts in situations involving especial economic hardship, likewise goes back to the Wagner Act period. In *Duluth Bottling Assn.*, 48 NLRB 1335 (1943), the Board upheld a lockout on the grounds that (p. 1336):

> "[N]ot only were the respondents motivated entirely by a desire to avoid the peculiar economic loss which would have been a fortuitous incident of a strike, but that the lock-out was intended merely to synchronize with, and not precipitate, economic conflict. We therefore find, as did the Trial Examiner, that the closing of the plants was not intended to interfere with or discourage union activity or to minimize the effectiveness of the Brewery Union's economic weapons, but was intended solely to protect the respondents' property and was therefore not in violation of the Act."

Thus, while under the Wagner Act the Board permitted the lockout in situations of peculiar economic hardship, the Board even then regarded the lockout as violative of the

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[12] The Court cited §§ 7, 2(3) and 13.

[13] See e.g., *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

Act if used as an offensive weapon in collective bargaining.

At any rate, the strike and the lockout clearly were not the legal corollaries of one another under the Wagner Act. The right to strike was in general protected by that Act, and never forbidden, while the lockout was proscribed except as a defensive measure against unusual economic loss.

While the Taft-Hartley Act added to the Wagner Act a number of restrictions on the right to strike, and also certain specific references to the lockout, it did not, we submit, basically alter the approach of the Wagner Act (and the common law too) of treating separately the legality of strikes and lockouts. With the single exception of the 60-day notice requirements of § 8(d), Taft-Hartley does not deal with the legality of the strike and the lockout together, or in parallel provisions, any more than did the Wagner Act. Let us examine the Taft-Hartley provisions.

Section 501(2) of the Taft-Hartley Act defines the term "strike" as used in all titles of the Act. Section 13 of the National Labor Relations Act, which is Title I of Taft-Hartley provides:

> "Nothing in this Act, *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, *or to affect the limitations or qualifications on that right.*"

The italicized provisions were added by Taft-Hartley to the existing Wagner Act provision. The reason for the additions was, of course, that while the Taft-Hartley Act preserved, in general, the right to strike, including in particular the right to strike over economic issues, it did place several specific restrictions on the right to strike.

Some of the Taft-Hartley provisions restricting the right to strike use the term "strike." See, *e.g.*, §§ 8(b)(4(i) and 8(d)(4). Other provisions, such as §§ 8(b)(1), (2) and (6),

while not using the term "strike," unquestionably do prohibit strikes having certain enumerated proscribed objects or effects.

Thus the over-all scheme of the Act is that the term "strike" is defined, and the right to strike is explicitly preserved, except as otherwise specifically provided.

The Act does not contain any provisions with respect to the lockout which even remotely parallel these provisions as to the strike. It contains no definition of the term "lockout" and no general provision that the lockout is either legal or illegal. It contains no provision comparable to § 9(b)(4)(i) explicitly making it an unfair labor practice for an employer to lockout for a proscribed object.

The general provisions of §§ 7 and 8(a), carried over into Taft-Hartley from the Wagner Act, do continue to, at the least, proscribe certain uses of the lockout, *e.g.*:

> "to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain." *Truck Drivers Local 449*, 353 U.S. at 93.

But while the general provisions of § 8(a) do forbid certain uses of the lockout, just as the general provisions of § 8(b) do forbid certain uses of the strike, the provisions are for the most part not parallel, and the proscribed uses are not the same ones. The banned uses of the lockout by employers for the most part have no strike counterparts, just as the banned uses of the strike for the most part have no lockout counterparts.

The only provision in the NLRA, *i.e.*, Title I of Taft-Hartley, which couples the strike and the lockout is § 8(d)(4) and that provision does not deal with the substantive legality of the strike or lockout, but simply prescribes certain notices. Specifically, § 8(d) defines the duty "to bargain collectively" and its subsections, includ-

ing (4) require that certain notices be given when a collective bargaining agreement is in effect before a party is permitted to resort "to strike or lockout" to secure a new or modified contract. Thus § 8(d)(4) is purely procedural. It does not make either strikes or lockouts for particular purposes either legal or illegal, nor does it carry any connotation that the one shall be legal when the other is. The most that can be said of § 8(d)(4) is that is that it assumes that lockouts may sometimes be legal. It "is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon." *(Truck Drivers Local 449,* 353 U.S. at 92-93.)

Strikes and lockouts are also coupled in several provisions in Title II, but again without regard to their substantive legality under Title I, and without any implications that the legality of the one depends on the legality of the other.

The first of these couplings of strike and lockout is in § 203. It simply states that the Director of the Federal Mediation and Conciliation Service shall seek to induce the parties to a labor dispute to settle the dispute "without resort to strike, lock-out, or other coercion."

There are also three separate references to "strike or lock-out" in the provisions dealing with "national emergencies," *e.g.*, §§ 206 and 208. These national emergency provisions may of course be invoked quite independently of whether the strike or lockout is legal or illegal under Title I, and thus have no relevance to the question here in issue.

It is thus quite clear that the lockout is not the corollary of the strike as respects their legality under the Taft-Hartley Act, with the single, and for this case irrelevant, exception of the notice requirement of § 8(d)(4). Under Taft-Hartley, the legality of strikes and lockouts are deter-

mined quite independently, just as under the Wagner Act and at common law.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Theodore J. St. Antoine
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D.C. 20005
Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N. W.
Washington, D.C. 20006

December 1964

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 323–325) is reported at 331 F. 2d 839. The Board's decision and order (R. 292–308) are reported at 142 NLRB 1362.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1964 (R. 326). The petition for a writ of certiorari was filed on July 6, 1964, and was granted on October 12, 1964 (R. 327). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the absence of special circumstances, an employer engaged in collective bargaining with a labor union is privileged to lay off his employees for the purpose of compelling the union to accept his terms.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), are set forth in Appendix A, pp. 33–38, *infra*.

STATEMENT

Petitioner builds and repairs ships at four shipyards adjacent to the Great Lakes. The Company's busy season is between November and April, when the Lakes are often frozen and shipowners are more willing to take their vessels out of service for repair (R. 272; 74, 156). During the summer months, however, petitioner has always retained a nucleus of employees to perform yard maintenance and emergency repairs, and to prepare for the winter (R. 273; 74, 78, 191, 213).

In the spring of 1961, petitioner and a negotiating team representing eight craft unions exchanged proposals for a new contract to replace the existing contract due to expire on August 1. Bargaining continued during June and July (R. 262–264). At the first bargaining session, the Union's chief negotiator, Alexander, announced that the Unions wished to negotiate an agreement without a strike, and thus to

avoid the shutdowns that had occurred in five of the previous ten years (R. 262, 269; 28). He assured petitioner that the Unions "definitely did not intend to have a strike" (R. 269; 31–32), and other Union representatives told the Company that it could freely accept jobs because the employees would guarantee completion of whatever work was in the shipyards (R. 269–270; 31–32).

On July 19, when the parties had agreed upon 20 articles of a new contract (R. 110, 137–139), the Unions proposed a six-month extension of the old agreement, which contained a no-strike clause (R. 263; 34). The Company rejected the suggestion on the ground that the extension would expire at the height of the busy season (*ibid.*). The Unions repeated their extension proposal on July 31 and made several counterproposals with respect to issues still dividing the parties (R. 264; 34–35, 112–113). The counterproposals were all rejected, but the Company asked and the Unions agreed that the Company's latest offer be presented to the employees. The Unions suggested further that the existing contract be extended until a new agreement, to be made retroactive to August 1, had been reached (R. 264; 35). While rejecting that proposal without explanation (R. 264; 35, 177), the Company agreed to extend the existing contract long enough for the union members to vote. The Company then asked whether the Unions were planning to strike the following morning. Alexander replied that they were not, reminded the Company that the Unions had consistently stated that they

would not strike, and reiterated that assurance (R. 264; 35–36). The employees continued to work after the contract expired on August 1 but rejected the Company's latest proposal (R. 264; 35–36). When Company negotiators inquired on August 8 why the Unions had not struck (R. 264; 38), Alexander replied that the Unions "had insisted that we never intended to strike" (R. 264; 38). The next day the Unions refused to take a new Company proposal back to the membership on the ground that it was less generous than the Company's previous offer (R. 265; 63–64).

Two days later, the Company shut down its Chicago yard, notifying the employees that it was laying them off because of "the labor dispute which has been unresolved since August 1, 1961" (R. 265–266).[1] In addition, petitioner laid off most of its employees at the Toledo yard, and began progressively to lay off workers at the Buffalo yard. At Lorain, however, an extensive force was engaged in the alteration of a large tanker, and none of those men was laid off (R. 272; 150–151). As the job was completed the Company laid off the Lorain employees. No employees at any yard went on strike (R. 247).

[1] The Company determined to word the layoff notices in that manner in order to deprive the laid-off employees of unemployment compensation (R. 266). In Illinois the employees were unable to obtain unemployment compensation because under Illinois law loss of work as a result of a labor dispute is noncompensatory. In Ohio and New York, when employees filed for benefits, the Company protested the allowance of compensation (R. 266; 129–130).

On August 19, at another bargaining session, the Company's attorney stated that the Company could not take on any work because it did not know when the Unions were going to strike. In reply, Union representatives repeated their assurance that there would be no strike, again guaranteed that work taken into the yards would be completed, and pointed out that no employees had quit at Lorain (R. 40–42). Finally, on October 22, a new contract was signed, and the laid-off employees were recalled to resume the emergency and maintenance work they had been doing prior to the August layoffs (R. 267, 274; 73, 74).

The Board concluded that petitioner had violated Sections 8(a) (1) and (3) of the National Labor Relations Act by curtailing its operations and laying off its employees to force the Unions to abandon their contract demands (R. 295–296). Without disturbing the Trial Examiner's finding that the parties had bargained to an impasse (R. 292, 280–282), it rejected petitioner's contention that the lockout was privileged under Board cases holding that lockouts were lawful to protect customers' property, prevent inventory spoilage, or guard the public safety from the effects of an imminent strike (R. 295).[2] Since the Unions had given numerous assurances that they would not strike and had promised that work in petitioner's yards would be completed, the Board found that petitioner

[2] See pp. 26–28, *infra*. The Trial Examiner had found the lockout privileged on this ground, and two dissenting Board members would have accepted the finding (R. 286–290, 301–305).

could not reasonably have feared a strike. It held, therefore, that the lockout had been used by petitioner as an "offensive weapon intended to force abandonment of the union's contract demands and the acceptance of the employer's" (R. 295–296) and hence violated the Act. It ordered petitioner to cease and desist from such illegal conduct in the future and to reimburse certain of the laid-off employees for loss of pay (R. 295, 297–298).[3]

The court of appeals enforced the Board's order. Viewing the problem as one of balancing the legitimate interests involved, the court concluded that the balance struck by the Board was entitled to stand (R. 323–325).[4]

ARGUMENT

Introduction and Summary

The findings of the Board, sustained by the court below, show that the employer, after an impasse in bargaining had been reached and even though a strike was not imminent, temporarily laid off or locked out his employees for the sole purpose of compelling them to accede to his contract terms rather than those sought by their union representative. The question presented is whether, in these circumstances, a so-

[3] Since the complaint was restricted to the layoffs at petitioner's South Chicago yard, the backpay order was similarly restricted (R. 297–298).

[4] The court also rejected certain contentions of Local 374, International Brotherhood of Boilermakers, the charging party, which had been advanced to enlarge the scope of the Board's remedial order (R. 324). Those contentions are not relevant here.

called "bargaining lockout" is a form of interference and restraint prohibited by Section 8(a)(1), and of discrimination prohibited by Section 8(a)(3), of the Act (pp. 14, 35, *infra*).[5]

Whereas the right to strike is explicitly safeguarded by Sections 7 and 13 of the Act, "there is no express provision in the law either prohibiting or authorizing the lockout * * *."[6] *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 92 (hereafter referred to as the *"Buffalo Linen"* case). Although the lockout was permissible without

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[5] The instant case has been set for argument following *National Labor Relations Board* v. *John R. Brown*, No. 7, this Term (R. 327). In that case, which involves a multi-employer bargaining unit, it is clear that the non-struck employers in the unit had a right to lockout when one of their members was struck (see pp. 28–29, *infra*). The question in *Brown* is whether they exceeded the privilege of defense of the multi-employer unit when they resumed operations, not with their regular employees, who were ready and willing to go to work, but with temporary replacements.

[6] It is misleading, therefore, to frame the question, as petitioner does (Br. 2), in terms of whether "an employer lockout is a corollary of the employees' right to strike." For it is plain that the two are not parallel. Thus, employees can strike against an employer's anti-union campaign but even petitioner concedes that a lockout may not be used in furtherance of such a campaign (Br. 12–13; see cases cited, n. 8, p. 9, *infra*). Similarly, although at common law there was no legal limitation on the use of the lockout (Pet. Br. 13), the right to strike was subject to many restrictions. See Millis and Montgomery, *Organized Labor*, 555–565 (1945). And, while a strike can be engaged in before an impasse in the bargaining is reached, some authorities who seek to equate the lockout and the strike would privilege the lockout only after impasse. See *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582 (C.A. 7); but cf. n. 14, p. 17, *infra*.

restriction at common law, the absence of any specific reference in the Wagner Act does not signify Congressional approval. For the Act "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice," but "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms."[7] *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 798. The legal status of the lockout, therefore, as the Court indicated in *Buffalo Linen,* is to be determined by "the balancing of the conflicting legitimate interests" involved in each situation. "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (353 U.S. at 96).

Petitioner concedes that a lockout is unlawful when its purpose is to frustrate the union's organizational efforts, undermine its position as bargaining representative, or discourage union membership (Pet. Br.

[7] Similarly, the fact (Pet. Br. 14) that many collective bargaining agreements contain provisions barring lockouts as well as strikes is of little significance. Such agreements frequently incorporate obligations which are already imposed by law, for example: forbidding discharges on account of union activity; recognizing the union as lawful bargaining agent of its employees; prohibiting secondary boycotts and sympathy strikes; and providing for union liability in the event of a strike in violation of the contract.

13, 17).[8] But, so long as the objective is merely to strengthen the employer's hand at the bargaining table and thereby force the employees to accept his terms, petitioner regards the lockout as a wholly legitimate weapon of economic warfare—regardless, apparently, of its effect upon the employees' protected rights. In support of that proposition, it draws upon the analogy of *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, in which this Court upheld the right of an employer to hire permanent replacements for striking workers.

It is clear, however, that the absence of an illegal motive does not in itself excuse conduct which inherently interferes with lawful concerted activities. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17; *Buffalo Linen, supra; National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221; *National Labor Relations Board* v. *Burnup and Sims, Inc.*, No. 15, this Term, decided November 9, 1964. Rather, the lawfulness of such conduct depends, as we have indicated, upon a "balancing of the conflicting legitimate interests." *Buffalo Linen, supra*, 353 U.S. at 96.

The principle is conclusively illustrated by the *Erie Resistor* case, *supra*. There the Board, without find-

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[8] *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681 (C.A. 1); *National Labor Relations Board* v. *Stremel*, 141 F. 2d 317 (C.A. 10); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (C.A. 2), certiorari denied, *sub nom. Modern Mfg. Co.* v. *National Labor Relations Board*, 344 U.S. 816; *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 238 (C.A. 8), certiorari denied, 334 U.S. 845.

ing an illegal motive, held that an employer had violated Sections 8(a) (1) and (3) of the Act by offering super-seniority rights to employees whom he hired as permanent replacements for striking workers. In so ruling, the Board rejected the contention that super-seniority granted during a strike is a legitimate corollary of the employer's right of replacement under *Mackay*. This Court affirmed, pointing out (373 U.S. at 229) that the Board had properly conceived its task, not as a quest for subjective motive, but as "the far more delicate task * * * of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." And since "the Board's judgment was that the claimed business purpose would not outweigh the necessary harm to employee rights—a judgment which we sustain—it could properly put aside evidence of respondent's motive and decline to find whether the conduct was or was not prompted by the claimed business purpose" (373 U.S. at 236–237). The super-seniority plan, condemned in *Erie Resistor*, and the replacement of strikers, approved in *Mackay*, differed not in respect to motivation, but rather in the degree of their impact upon protected employee rights. "Because the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment

resulting from super-seniority in addition to permanent replacement" (373 U.S. at 232). By the same token, we submit, the fact that the employer's interest in keeping his plant running was held to justify the harmful conduct in *Mackay* does not necessarily mean the employer's less weighty interest in achieving a bargaining victory will outweigh the damaging consequences of the lockout here.[9]

The questions to be answered, therefore, are (1) whether the bargaining lockout interferes with protected employee rights and, if so, (2) whether the lockout may nonetheless be justified by some overriding interest of the employer.

In the Board's view a lockout during contract negotiations clearly falls within the literal ban of Section 8(a). To deprive employees of their livelihood because of demands made by their representative at

[9] Petitioner argues (Br. 17–18) that it would be inconsistent to sanction the permanent replacement of economic strikers, which was done in *Mackay*, and yet to prohibit a temporary lockout which has a less severe impact upon the employees involved. The question here, however, is not whether replacement of strikers has a more adverse effect upon employees than a lockout, but whether it would further the basic aim of the Act if employers were given the general right to lockout in addition to the right to replace economic strikers. Furthermore, in one respect the lockout may have a greater impact than the replacement of strikers, since it affects all employees in the unit, whereas replacement affects only those replaced. Finally, the employer's replacement of strikers in *Mackay* was to defend itself against an existing strike by continuing to operate its business, whereas in the present case petitioner's lockout was used as a weapon in its economic contest with the Union at a time when no strike was even threatened.

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the bargaining table, and in order to compel their submission to the employer's demands, "coerces" them in the exercise of their right to bargain collectively and discourages resort to that right. In addition, it interferes with the right to strike, preempting the use of the strike weapon and depriving the union of control over the timing of the economic contest.

Such conduct is lawful, therefore, only if the adverse impact upon employee rights is outweighed by a legitimate countervailing interest of the employer. The Board has found such justification in two classes of cases: *First,* it has permitted employers to discontinue operations in the face of an imminent strike threat, in circumstances where a sudden strike would have subjected the employer to property loss, contract damages, or other economic injury above and beyond the loss of business normally incident to a work stoppage. In such cases, the lockout serves a purely "defensive" purpose and, on balance, is justified. *Second,* the Board has sanctioned lockouts by the non-struck members of a multi-employer bargaining unit in response to a strike against one member to enforce contract demands against all; in that situation, the lockout serves the legitimate defensive purpose of protecting the multi-employer unit against disintegration through successive strikes against each member individually.

In cases such as the present, however, where there is no imminent threat of a strike likely to cause extraordinary injury (or indeed any strike at all), and

where the lockout is used solely as an offensive bargaining weapon, the Board has concluded that no overriding employer interest is present. Neither the obtaining of a favorable contract, nor the avoidance of the normal consequences of a strike at some indeterminate time in the future, is an interest of sufficient weight to justify the harm inflicted upon employee bargaining rights. We submit that the balance struck by the Board is reasonable and should not be disturbed.[10]

THE BOARD REASONABLY BALANCED THE COMPETING INTERESTS IN CONCLUDING THAT A SINGLE EMPLOYER MAY NOT LOCKOUT HIS EMPLOYEES IN ORDER TO COMPEL THEM TO SUBMIT TO HIS BARGAINING DEMANDS

A. THE BARGAINING LOCKOUT SERIOUSLY INTERFERES WITH THE RIGHT TO STRIKE AND THE RIGHT TO ENGAGE IN COLLECTIVE BARGAINING

1. In Section 1 of the National Labor Relations Act (p. 33, *infra*), Congress found that inequality of bargaining power between employees and employers obstructed the free flow of commerce and aggravated business depressions. The purpose of the Wagner Act was to remove that obstruction, and redress that inequality, by enhancing the bargaining power of the employees.

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[10] The Board's position has been sustained by three other circuits as well. *Quaker State Oil Refining Corp.* v. *National Labor Relations Board*, 270 F. 2d 40 (C.A. 3), certiorari denied, 361 U.S. 917; *Utah Plumbing & Heating Contractors Ass'n* v. *National Labor Relations Board*, 294 F. 2d 165 (C.A. 10); *Body & Tank Corp.* v. *National Labor Relations Board* (C.A. 2), decided December 3, 1964 (set forth in Appendix B, *infra*, pp. 39–45). *Contra: National Labor Relations Board* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886 (C.A. 5).

To that end, Section 7 of the Act guarantees to employees the right—

> to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 13 adds that—

> Nothing in this Act, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *.

Those guarantees are implemented by Sections 8(a)(1) and (3). The former makes it an unfair labor practice for an employer—

> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

The latter makes it an unfair labor practice for an employer—

> by discrimination in regard to hire or tenure of employment * * * to * * * discourage membership in any labor organization:

We submit that the bargaining lockout falls within the literal ban of Section 8(a)(1).[11] To deprive em-

[11] It also violates the literal terms of Section 8(a)(3), for depriving employees of work in these circumstances is "discrimination" which forseeably discourages union membership and activity. Detrimental treatment constitutes Section 8(a)(3) "discrimination" even if it is meted out equally to union members and nonmembers. See, *e.g.*, *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681 (C.A. 1) (lockout

ployees of their livelihood on account of the demands made by their representative at the bargaining table, and in order to force their submission to the employer's terms, "coerces" them in the exercise of their right to bargain collectively and discourages resort to that right.[12] In addition, it severely impairs the effectiveness of the right to strike. Unlike the permanent replacement of strikers, which merely counteracts the effect of a strike after it has been called, the lockout preempts the use of the strike weapon altogether. Moreover, by depriving the union of the ability to control the timing of the economic showdown, such a lockout destroys an essential aspect of the right to strike.

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upon demand for collective bargaining): *National Labor Relations Board* v. *Stremel*, 141 F. 2d 317 (C.A. 10) (same); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (C.A. 2), certiorari denied *sub nom. Modern Mfg. Co.* v. *National Labor Relations Board*, 344 U.S. 816 (same). However, since the finding of a Section 8(a)(1) violation would alone be sufficient to sustain the Board's order, here, as in *National Labor Relations Board* v. *Burnup and Sims, Inc.*, No. 15, this Term, decided November 9, 1964, slip opinion, p. 2, the Court may "find it unnecessary to reach the questions raised under § 8(a)(3)."

[12] Petitioner suggests (Br. 18) that the refusal of an employer to yield to the union's demands would similarly weaken the union's position and encourage defections among its members. It is one thing, however, to say that an employer may reject his adversary's demands and quite another thing to say that he may throw his employees out of work in order to make them acceed to his demands. The right to say no is inherent in the very concept of "bargaining"; but the ability to inflict damage upon one's opponent in order to compel his acquiescence plainly is not. How smoothly the collective bargaining process can operate without the lockout is evidenced by the relative infrequency of its use in recent years.

Since a work stoppage is highly costly to the union and the employees, as well as to the employer, strikes are seldom called except as a last resort. It is the ever present (and sometimes imminent) possibility of a strike, rather than the strike itself, which exerts pressure on both sides to adjust their differences and reach agreement.[13] The efficacy of that pressure, however, and the parity of bargaining power which the Act seeks to attain, depend in large measure on the employer's uncertainty as to when the shutdown will come and his fear that it will come when he is most vulnerable. If an employer were permitted to effect a shutdown on his own initiative and on a date of his own choosing, the threat of a strike would carry far

[13] As one study has pointed out (*Factors in Successful Collective Bargaining*, Report of the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare of the United States, 82d Cong., 1st Sess., 7):

"* * * The strike threat, and the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements. Agreement normally is reached without a work stoppage because neither side wants to incur the cost of such stoppage and makes reasonable adjustments to avoid it.

* * * * * *

"* * * reliance on collective bargaining means dependence on the possibility, even the imminence, of a strike in every collective bargaining session. The calculation of the cost of a strike to the parties facilitates a meeting of minds without actual resort to the strike and thus performs a vital collective bargaining function * * *.

* * * * * *

"The threat of a strike, which must be exercised when necessary if it is to remain a threat, is the drive which gives continuous meaning and substance to collective bargaining. * * *"

See, generally, Kerr, *Bargaining Processes*, in Bakke, Kerr, Anrod, *Unions, Management and the Public*, 284 (1960); Slichter, *The Determinants of Bargaining Power*, in Bakke & Kerr, *Unions, Management, and the Public*, 205 (1948); Hiller, *The Strike, A Study in Collective Action*, 126–132 (1928).

less influence at the bargaining table. For, by stockpiling inventories, readjusting contract schedules, and transferring work from one plant to another, the employer can often make himself virtually "strike-proof" during the period following the expiration of a contract. And if, in addition to these legitimate defensive measures, he were at liberty also to lockout his employees at this moment of maximum strength, the union would be at his mercy.[14] The Board has reasonably concluded that the availability of such a weapon would so substantially tip the scales in the employer's favor as to defeat the Congressional purpose of placing employees on a par with their adversary at the bargaining table. See *Body & Tank Corp.* v. *National Labor Relations Board* (C.A. 2), decided December 3, 1964 (Appendix B, *infra,* p. 44). To permit the preemptive lockout, moreover, would run counter to the "positive command of § 13 that the right to strike is to be given a generous interpretation" and would be incompatible with the "deference paid the strike weapon by the federal labor laws." *Erie Resistor, supra,* 373 U.S. at 234–235.[15]

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[14] If, as petitioner contends, the bargaining lockout were deemed to be the counterpart of the strike, there is no logical reason why the employer would not be able to lockout even before an impasse in the bargaining were reached. See Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. Chi. L. Rev. 70, 73, n. 19 (1956); but cf. *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582 (C.A. 7).

[15] See also *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457, n. 3; *Amalgamated Ass'n of Street Electric Railway Employees* v. *Wisconsin Board*, 340 U.S. 383, 395, n. 21; *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 673, n. 8.

Additionally, the bargaining lockout would militate against the Act's broader objectives of preventing obstructions to commerce and promoting labor peace. For it would generate work stoppages which might not otherwise have occurred and prolong others which might have been terminated by the employees themselves.[16] Moreover, even when not actually used, the very availability of the lockout would serve as a constant provocation; unions which had little interest in striking might well deem it prudent to take preemptive action in order to avoid being subjected to a lockout at a time when the balance of advantages was less favorable. And conversely, as in the present case, the merest possibility of a future strike might suffice to trigger a preemptive lockout. In light of these considerations, the Board properly held that the bar-

[16] If employees go out on an economic strike, the employer is free to find permanent replacements for them. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. However, it has heretofore been held that, if a striker offers unconditionally to return to work before he has been permanently replaced, the employer commits an unfair labor practice if he refuses to take him back. See *Fifth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547 (C.A. 10). But, if the bargaining lockout were permissible, it would follow that the employer could not only force employees to strike, but he could refuse to reinstate unreplaced strikers who were willing to return to work until they acceded to his contract demands—thereby depriving employees of the power to terminate a strike and prolonging the work stoppage. See *American Stores Packing Co.*, 142 NLRB 711, 712, 719, petition for enforcement filed (C.A. 10), No. 7702.

gaining lockout interferes with rights protected by the Act and, *prima facie* at least, is unlawful.

2. This conclusion is in no way inconsistent with the Court's holding in *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U.S. 477. There the Board sought to outlaw disruptive on-the-job union tactics as a violation of the duty to bargain in good faith under Section 8(b)(3) of the Act (361 U.S. at 490). This Court disapproved the order on the ground that the use of such economic pressure was not necessarily indicative of bad faith and that the Board could not regulate the parties' choice of economic weapons under the guise of determining their "good faith" in the negotiations. The most that can be inferred from that case is that the lockout here would not constitute a breach of the employer's duty to bargain in good faith under Section 8(a)(5). But it was not on that ground that the Board condemned the lockout. The fact that an employer may be genuinely interested in reaching an agreement assuredly does not insulate his conduct from scrutiny under Sections 8(a)(1) and (3). Those subsections are intended to protect employees against *all* employer conduct—including the use of bargaining weapons—which unduly interferes with the exercise of rights granted them by the Act. Since there are no comparable provisions for the benefit of employers, the issue presented here was not even potentially involved in *Insurance Agents'*.

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It is plain that the super-seniority plan struck down in *Erie Resistor* stands on no better footing when viewed as a bargaining tactic than when regarded as a defensive measure aimed at keeping the plant open. So, too, a permanent discharge, as distinguished from a temporary layoff, of all employees in a bargaining unit would clearly be barred, even if its purpose were the "innocent" one of strengthening the employer's bargaining position by forcing the union to surrender contract demands in return for the employees' reinstatement. *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529 (C. A. 7), certiorari denied, 346 U.S. 909. Indeed, in *Insurance Agents'* the Court recognized (361 U.S. at 499) that the Board plays a different role in applying the statutory policies of the National Labor Relations Act when it determines the validity of the lockout and its impact upon employee rights than when it determines whether there has been a failure to bargain in good faith.

3. Nor do the Taft-Hartley amendments indicate a Congressional purpose to sanction the bargaining lockout. Section 8(d) (4) of the amended Act (p. 36, *infra*) requires the parties to give 60 days' notice of contract termination and, pending the expiration of this period, to keep the contract in effect "without resorting to strike or lockout." This provision may imply that the lockout is permissible in some circumstances (Pet. Br. 14–15), but it does not indicate what those circumstances are.[7] It is clear, for exam-

[7] The same may be said for the reference to strikes and lockouts in Sections 203(c), 206, and 208(a) in Title II of the Labor-Management Relations Act (pp. 37–38, *infra*), and for the Wagner Act history noted by the Court in *Buffalo Linen*, 353 U.S. 87, 92, n. 15.

ple, that Section 8(d) would not privilege a lockout in furtherance of an anti-union campaign after a 60-day waiting period; for that section must be read in harmony with the other provisions of the Act, including Sections 8(a), 7, and 13.

It does not follow that, because Section 8(d)(4) equates the terms "strike and lockout" and a strike in support of bargaining demands after the 60-day period would be lawful, Congress intended a bargaining lockout to have the same privilege (Pet. Br. 21). As the Board has pointed out (*Morand Bros. Beverage Co.*, 99 NLRB 1448, 1463–1464):

> It seems clear to us from a reading of Section 8(d)(4) that the sole concern of Congress in enacting that provision * * * was to discourage resort to self-help by *both* employees and unions during the 60-day period and to induce them to bargain collectively during that period. It is understandable that, in seeking to underscore this purpose, Congress would specifically proscribe the most relevant forms of self-help—namely, strikes and lockouts. It follows from this view that Congress was not concerned at this point with the legal status of strikes and lockouts under other provisions of the Act but was solely desirous of insuring that, *whatever that status might be,* no strikes or lockouts would occur during the 60-day period.

Petitioner also points to the fact that, in the Taft-Hartley amendments, Congress intended to increase

the relative power of employers (Br. 14–15).[15] But, as the Board has stated (*Morand, supra,* at 1464):

> If that argument has any basis at all, it derives from the fact that in Section 1 of the Act, as amended in 1947, Congress, while retaining the original declaration of its purpose to eliminate the inequality of bargaining power arising from the superior economic strength of employers as against unorganized employees, further stated as its purpose to eliminate "certain practices by some labor organizations." However, in furtherance of this new additional policy Congress, in Section 8(b) of the amended Act, proscribed certain practices by *labor organizations,* and added certain obligations on the part of unions. It did not seek to accomplish its purpose by narrowing the previously existing proscriptions on *employer* conduct which had been contained, and continued to be contained, in Section 8(a)(1) and 8(a)(3), other than to add a statutory guarantee of free speech. If Congress had intended to accord employers the right to lock out employees temporarily in order to obtain bargaining concessions, notwithstanding the necessary impingement of such lock outs upon the concerted activities of employees, we believe it would have so provided expressly. This it did not do.

B. THE BARGAINING LOCKOUT IS NOT PRIVILEGED BY ANY LEGITIMATE COUNTERVAILING INTEREST OF THE EMPLOYER

As we have indicated, not every activity which interferes with protected employee rights is unlawful,

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[15] See also Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. of Chi. L. Rev. 614, 619 (1961).

for the adverse consequences of such conduct may be outweighed by legitimate countervailing interests. See *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 797–798; *National Labor Relations Board* v. *Erie Resistor Corp.,* 373 U.S. 221, 229–230. And the Court has specifically so recognized in the case of a lockout. *Buffalo Linen, supra.* The question becomes, therefore, whether a bargaining lockout such as the one involved here is privileged because of some overriding interest of the employer. The Board, we submit, reasonably concluded that it is not.

1. Since the Board found that there was no reasonable basis for fearing a strike, either immediately or in the foreseeable future, the only interest served by the lockout was the employer's interest in enhancing its bargaining position and bringing negotiations to a successful close. That interest alone did not outweigh the harm inflicted on the collective bargaining rights of the employees. A lockout is not required in order to assure the employer equality of bargaining power; for, if anything, the position of an employer during the course of the bargaining period is inherently more favorable than that of the union. So long as the employer rejects their demands, the employees, if unwilling to strike, must continue to render services under terms which are unacceptable to them but satisfactory to the employer. In the ordinary case, as here, it is the union, not the employer, which seeks to modify the existing terms of employment; yet, pending a new agreement, it is those terms which usually

remain in effect. Occasionally, to be sure, the employer is the party who wishes to change the *status quo*, demanding, for example, a wage reduction or a curtailment of fringe benefits. But, even in that situation, he has the right, after a bargaining impasse, to impose unilaterally the terms which the union has rejected. See *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224–225 (dictum); *National Labor Relations Board* v. *Tex-Tan, Inc.*, 318 F. 2d 472, 479–482, and n. 21 (C.A. 5); *Mission Mfg. Co.*, 128 NLRB 275.

The employer, therefore, unlike the union, has no need to exert offensive pressure, or for that matter even to obtain an agreement, in order to bring into being the conditions he desires. Indeed the ability of the employer to control the interim terms of employment is itself an effective form of pressure, for it confronts the employees with a Hobson's choice between accepting the limited concessions which the employer may have offered at the bargaining table or continuing to work under existing, and presumably less acceptable, conditions. It is true that the union may demand that the new contract apply retroactively to the bargaining period; but there is no assurance that this demand will be met or that the union will not have to concede other points in exchange. In these circumstances, the interest of the employer in forcing agreement and bringing negotiations to a prompt and favorable conclusion is plainly not of sufficient weight to justify the use of offensive pressure against his employees.

Nor is a preemptive lockout privileged by an employer's interest in avoiding the normal consequences of a possible strike during his busy season. We stress again the Board's finding that in this case such a strike was not reasonably foreseeable; the Union not only assured the employer that it had no present strike plans, but even proposed that the existing contract, which contained a no-strike clause, be extended indefinitely until a new agreement could be reached (R. 296). The result would be no different, however, even if the employer's fear were well-grounded.

A present and immediate interference with protected employee rights is not warranted by the mere possibility of a strike at an indeterminate time in the future. Moreover, it is the Board's judgment—and one which accords with the repeated Congressional solicitude for the integrity of the strike weapon—that the interest of the employer in being free of the ordinary hazards of a strike is outweighed by the interest of the employees in being free to use the strike weapon at a time of their own choosing. This does not mean, as petitioner suggests, that an employer must remain in a state of maximum vulnerability. On the contrary, he has potent weapons with which to resist a strike and preserve his bargaining position. For example, the right to hire permanent replacements for striking workers not only serves as an effective deterrent, but often enables the employer to continue operations even in the teeth of a strike. In addition, such countermeasures as the stockpiling of inventories and the transfer of orders to plants not affected by the

strike may substantially mitigate the impact of a work stoppage. It should not be overlooked, moreover, that a strike takes its toll from the union, as well as the employer, draining its funds, straining the allegiance of its members, and exposing them to the risk of permanent loss of their jobs. In light of these considerations, the Board was well within its discretion in concluding that the availability of the offensive bargaining lockout is unnecessary to maintain the employer's parity of bargaining power and that its impact upon protected employee rights is not offset by any countervailing employer interest.

2. The absence of any overriding justification for the bargaining lockout is underscored by a consideration of those lockouts which the Board has found privileged. As noted above the Board has sanctioned lockouts in two types of situations: when an imminently threatened strike would subject the employer to extraordinary forms of economic injury; and when a strike against one member of a multi-employer bargaining unit foreshadows a series of "whipsaw" strikes against the other members and thereby threatens to atomize the bargaining unit.

(a) The first class of cases is typified by *Building Contractors Assn. of Rockford, Inc.*, 138 NLRB 1405. There a group of contractors engaged in building roads, bridges, and overpasses, suspended operations in the face of an imminent strike threat by the union. It was shown, *inter alia*, that a "quickie" strike called during construction of a project would expose the employers to contractual penalties for late comple-

tion and would both endanger and inconvenience the public, that continuous pouring of concrete was essential to the construction of a bridge or highway once that operation was underway; and that the union had failed to give assurance that a strike would be heralded by adequate warning. In these circumstances, the Board held that the shutdown was a legitimate protective measure. Similarly, the Board has sanctioned lockouts where an imminently scheduled strike would have resulted in the spoilage of perishable inventories (*Duluth Bottling Association,* 48 NLRB 1335, 1359–1360), where the prospect of recurrent work stoppage made further operations uneconomical because of the employer's inability to plan production schedules (*International Shoe Co.* 93 NLRB 907), and where continued acceptance of automobile repair work would have been imprudent without assurance from the union that work already in the shop would be completed in the event of a strike, which was near at hand (*Betts Cadillac Olds,* 96 NLRB 268). In all of these cases, the purpose and effect of the shutdown was not to bludgeon the union into accepting the employer's bargaining demands, but rather to discontinue plant operations which could not be economically carried on in the face of an immediate strike threat, or which, if suddenly interrupted by a strike, would have subjected the employers to property loss, contract damages, or other economic injury above and beyond the loss of business normally incident to a work stoppage. See, generally, Koretz, *Legality of the*

Lockout, 4 Syracuse L. Rev. 251, 254–256, 269–270 (1953).

The situation here is obviously quite different. There was no strike threat, imminent or otherwise. The union disclaimed any intention of striking; promised that if a strike did occur, work already in the shipyards would be completed; and proposed the indefinite extension of the existing contract, including its no-strike clause. There was no showing that continued operation of the yards was uneconomical or would expose the employer to extraordinary risks. And, while the employer's motivation could perhaps be described as "defensive" in the sense that it wished to avoid the consequences of a future strike, the intermediate objective, unlike in the cases cited above, was purely offensive—to force the union to its knees and obtain its capitulation before the winter season arrived.

(b) The Board, with the approval of this Court, has also permitted the nonstruck members of a multi-employer bargaining unit to close their doors in response to a strike against one member to enforce contract demands against all. Such a strike carries with it the threat of successive strikes against the other members individually, and, but for the lockout, this "whipsaw" technique would pick off the members one by one, depriving them of the advantages of multi-employer bargaining and destroying the bargaining unit. Recognizing that multi-employer units had contributed to labor peace, that Congress had approved the Board's policy of certifying them, and

that the lockout was necessary to protect them against atomization, the Board concluded that the value of preserving such units justified resort to the lockout. *Buffalo Linen Co.*, 109 NLRB 447, affirmed *sub nom National Labor Relations Board* v. *Truck Drivers Local 449, supra.*[19]

To be sure, the danger of "whipsawing" may be just as great in the case of single-employer units. But the interests served by the multi-employer bargaining unit, and therefore safeguarded by the *Buffalo Linen* rule, are not confined to the protection of small employers against successive strikes, important though that factor may be. In addition, group bargaining benefits unions by assuring standardized wages for the employees they represent, minimizing their organizational expenses, and increasing their security against raiding by outside organizations; it affords unions and employers alike the convenience of having but one set of negotiations to prepare for, and a single contract to administer; it makes available greater resources for factfinding, research, and other aids to negotiation; and it frequently tends to enhance responsibility in bargaining. (See the Board's brief in *Truck Drivers' Local 449, supra,* pp. 23–24, and authorities cited therein.) No comparable interests

[19] Prior to *Buffalo Linen, supra*, the Board had held such lockouts unlawful. See *Morand Bros. Beverage Co.*, 91 NLRB 409, enforced in part and remanded in part, 190 F. 2d 576 (C.A. 7), on remand, 99 NLRB 1448, enforced on remand, 204 F. 2d 529 (C.A. 7); *Davis Furniture Co.*, 94 NLRB 279, remanded, 197 F. 2d 435 (C.A. 9), on remand, 100 NLRB 1016, set aside *sub nom. Leonard* v. *National Labor Relations Board*, 205 F. 2d 355 (C.A. 9).

are jeopardized by the threat of a strike against an employer not a member of such a unit.

It should be emphasized, moreover, that the rule of *Buffalo Linen*, unlike that advocated by the petitioner here, does not deprive the union of control over the timing of the economic contest. It merely provides that if the union strikes one member it must be prepared for work stoppages at the other plants as well. The initiative, however, remains with the union. It may postpone its strike until the busy season without fear of being victimized by a preemptive lockout. And, until the union has actually wielded the strike weapon, the members of a multi-employer unit have no more right than the single employer to resort to a lockout. In sum, the interference with protected employee rights is far less drastic in the *Buffalo Linen* situation than it is here, while, on the other hand, the countervailing interests are more substantial.

In sum, we submit that the balance struck by the Board was a reasonable one and well within its discretion. Accordingly, the court below properly held that there was "no basis for disturbing the Board's conclusions." [20] (R. 325).

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[20] Some writers, to be sure, have expressed the view that the lockout is the counterpart of the employees' strike weapon. See the quotation from Millis and Montgomery, *Organized Labor*, at p. 13 of the petitioner's brief. See also Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, 50 Harv. L. Rev. 1071, 1110 (1937); and the excerpts set forth in Koretz, *Legality of the Lockout*, 4 Syracuse L. Rev. 251, 268, n. 82 (1953).

In some instances, however, it appears that the writer is

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
FRANK GOODMAN,
Assistant to the Solicitor General.
ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GEORGE B. DRIESEN,
Attorney,
National Labor Relations Board.

DECEMBER 1964.

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merely describing the tactics which employers and unions have historically used in organizational campaigns, without considering the further question of whether, and to what extent, the use of such tactics has been qualified by the National Labor Relations Act. The first part of the quotation relied on by petitioner (Br. 13), for example, reads in full as follows (Millis and Montgomery, *Organized Labor*, 554 (1945)): "* * * In exerting pressure upon employers to recognize them and to accept their demands, unions, provided argument is unsuccessful, resort to the strike, the boycott, and possibly violence and sabotage. The employers resort to corresponding methods—the lockout, the black list, and violence. * * *" It is clear that the Act restricts the use of the black list and violence; the same applies, we submit, to the lockout.

Moreover, to the extent the statements may be interpreted as expressing the view that a lockout by a single employer to advance his bargaining position is an integral element of the system of collective bargaining, and necessary to balance the

union's strike weapon, we submit that they reflect an incomplete analysis of the problem, and are contrary to experience. For these commentators, many of whom wrote in the early days of the Act, do not mention the countervailing management weapons which have led the Board to conclude that there is no need, in the ordinary case, to add the lockout to management's arsenal. Judge Magruder's article, *supra*, was written before this Court decided in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, that employers could offer strikebreakers permanent employment. Furthermore, an employer's right unilaterally to change working conditions once an impasse has been reached was not clearly articulated by the Board until 1948, in *W.W. Cross & Co.*, 77 NLRB 1162, 1165-1166, although that view may have been the basis of decision in two earlier cases, *Southern Prison Co.*, 46 NLRB 1268 (1943) (alternative ground), and *Exposition Cotton Mills Company*, 76 NLRB 1289, 1291–1292 (1948).

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*) are as follows:

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers and members, have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract

for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

The relevant provisions of the Labor Management Relations Act are as follows (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

TITLE II

SEC. 203. * * *

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

* * * * *

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

* * * * *

SEC. 208. (a) Upon receiving from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

* * * * *

APPENDIX B

United States Court of Appeals for the Second Circuit

No. 50—September Term, 1964

(Argued October 6, 1964. Decided December 3, 1964)

Docket No. 28589

BODY & TANK CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before LUMBARD, *Chief Judge,*
HAYS and ANDERSON, *Circuit Judges*

Petition for review of an order of the National Labor Relations Board, 144 N.L.R.B. No. 136 (1963), based upon a finding of violation of Sections 8(a) (1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a) (1), (3) and (5) (1958 and Supp. V, 1964). The Board seeks enforcement.

Petition denied; order enforced.

HARRY B. SALE, New York, N.Y. (Sale & Sale, Robert Sale, on the brief), *for Petitioner.*

MELVIN J. WELLES, Attorney, NLRB, Washington, D.C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Vivian Asplund, Attorney, NLRB, of counsel), *for Respondent.*

SIPSER, WEINSTOCK & WEINMANN, New York, N.Y. (Richard Dorn, on the brief), *for Local No. 455, International Ass'n of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, amicus curiae.*

HAYS, *Circuit Judge:*

Petitioner Body and Tank Corp. asks that an order of the National Labor Relations Board, 144 N.L.R.B. No. 136 (1963), based upon a finding of violation of Section 8(a) (1), (3) and (5) of the National Labor Relations Act[1] be set aside. The Board seeks enforcement of its order.

Petitioner, a manufacturer and distributor of structural steel products, had a collective bargaining agreement with Local 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, which terminated on January 31, 1963. Negotiations for a new agreement were carried on during November and January, but on January 31, an issue concerning the vacation clause remained unresolved. The Company proposed to revise the vacation clause to conform the vacation schedule to that in the Union's contract with the Allied Association of Structural Steel Manufacturers while the Union

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[1] 29 U.S.C. § 158(a) (1), (3) and (5) (1958 and Supp. V, 1964).

wanted to continue the clause contained in the agreement which had just expired. On Friday, February 1, there were further fruitless efforts at agreement and on Monday, February 4, the Employer excluded the members of the bargaining unit from their jobs.

The first issue for our determination is presented by the conflicting interpretations of the Employer's action in excluding the employees. The Board has found that the Employer locked out the employees, with the intent of forcing them to agree to the proposals of the Employer for a collective agreement. The Petitioner maintains that it merely laid off the men for lack of work.

The record reveals that when the employees applied for unemployment compensation, the Employer stated that their loss of employment was due, not to a layoff, in which case they would have received compensation, but to a "labor dispute." This prevented their getting unemployment benefits.

This admission by the Employer, the evidence of the Employer's repeated assertions "no contract, no work," and of an assurance by the Employer that the employees would be put back on the job the day after the contract was signed, together with the failure of the Employer's evidence to establish any economic necessity for laying off the employees (the employees who were not in the bargaining unit were not laid off) support the Board's view of the Employer's action as constituting a lockout.

We hold that this evidence is sufficient when considered in the background of the record as a whole to support the finding that the employees were locked out by the Employer for the purpose of enhancing its bargaining position. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

The Employer's alternative contention, that it locked out the employees because of the threat of a strike, finds no corroboration in the evidence.

The more difficult issue is whether the Board was correct in holding that the Employer violated the Act by resorting to a lockout to further its bargaining position. This is a case of first impression in this circuit. The circuits which have passed on the issue are in disagreement. The Third,[2] Tenth,[3] and District of Columbia[4] Circuits have upheld the Board's position; the Fifth Circuit[5] has rejected it.

In *NLRB* v. *Truck Drivers Union*, 353 U.S. 87 (1957), the Supreme Court upheld the Board in ruling that an employers' association could use a lockout defensively against a union's whipsawing tactics designed to destroy a multi-employer bargaining unit. In its opinion in the *Truck Drivers* case the Court stated that it was not "called upon to define the limits of the legitimate use of the lockout" and that it was "unnecessary to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike."[6]

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[2] *Quaker State Oil Ref. Corp.* v. *NLRB*, 270 F. 2d 40 (3d Cir.), certiorari denied, 361 U.S. 917 (1959).

[3] *Utah Plumbing and Heating Contractors Ass'n* v. *NLRB*, 294 F. 2d 165 (10th Cir. 1961).

[4] *Local 374, International Brotherhood of Boilermakers*, v. *NLRB*, 331 F. 2d 839 (D.C. Cir. 1964), certiorari granted *sub nom. American Shipbuilding Co.* v. *NLRB*, 33 U.S.L. Week 3128 (U.S. Oct. 12, 1964) (No. 255).

[5] *NLRB* v. *Dalton Brick and Tile Corp.*, 301 F. 2d 886 (5th Cir. 1962); cf. *Leonard* v. *NLRB*, 197 F. 2d 435 (9th Cir. 1952), after remand, 205 F. 2d 355 (1953); *Morand Bros. Beverage Co.* v. *NLRB*, 190 F. 2d 576 (7th Cir. 1951), after remand, 204 F. 2d 529 (1953).

[6] 353 U.S. at 93 and n. 19.

Of the roles of the courts and the Board in respect to the issue of the legality of a lockout in any particular situation the Court said:

> "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." [7]

The Board argues that the lockout is not the corollary of the strike since the strike is a protected activity under Section 7 [8] and is given a preferred position under Section 13,[9] while the lockout is clearly unlawful in some situations, as, for example, when it is used for the purpose of interfering with unionization. *NLRB* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (2d Cir.), certiorari denied *sub nom. Modern Mfg. Co.* v. *NLRB*, 344 U.S. 816 (1952).

The Board contends that the lockout engaged in to further the employer's bargaining position is a viola-

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[7] 353 U.S. at 96.

[8] 29 U.S.C. § 157; "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[9] 29 U.S.C. § 163: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

tion of Section 8(a)(1) [10] and Section 8(a)(3) [11] because it interferes with the right to strike, "blunts" the strike weapon, discourages union activity, and unduly diminishes the union's bargaining power. It "tips the scales in favor of the employer." The Board points out that, to counterbalance the strike weapon, the employer has the right to replace striking employees,[12] and after an impasse to institute unilaterally terms of employment which the employees have rejected.[13] To give the employer in addition the right to a bargaining lockout would be to defeat the Congressional purpose in increasing union bargaining power by statutory protection of the right to strike.

The Board has found that the Employer's conduct also violates Section 8(a)(5).[14] The finding as to Section 8(a)(5) is dependent on the finding as to Sections 8(a)(1) and 8(a)(3). The Board holds, in

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[10] 29 U.S.C. § 158(a): "It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[11] *Supra* n. 10.

[12] *NLRB* v. *Mackay Radio and Tel. Co.*, 304 U.S. 333 (1938).

[13] *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224–225 (1949) (dictum).

[14] *Supra* n. 10.

effect, that an employer who uses in collective negotiations a method which is unlawful because it interferes with and restrains employees and by discrimination discourages union membership is refusing to bargain collectively as required by the Act.

We cannot say that the Board's interpretation of the statute is not correct or that the Board is in error in applying that statutory interpretation to the facts of the present case. In this area which the Supreme Court has told us is one of delicate balance between conflicting interests, we cannot say that the balance struck by the Board is outside the scope of its competence.

Petition for review denied; enforcement granted.

U.S. GOVERNMENT PRINTING OFFICE: 1964